March 17. 79. Arg'd N St Sm

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 179.

JOSEPH GRAFTON, PLAINTIFF IN ERROR,

vs.

STEPHEN H. CUMMINGS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 4, 1876.

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1 UNITED STATES OF AMERICA, *ss:*.

The President of the Unined States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Stephen H. Cummings, plaintiff, and Joseph Grafton, defendant, a manifest error hath happened, to the great damage of the said Joseph Grafton, defendant, as is said, and as appears by his complaint; we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to oe done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of February, in the year of our Lord one thousand eight hundred and seventy-six and of the Independence of the United States the one hundredth.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

2 (Indorsed:) U. S. circuit court for the southern district of New York. Stephen H. Cummings ag'st Joseph Grafton. Writ of error. Platt & Gerard, attorneys, 45 William st., N. Y. Writ allowed. Alex. S. Johnson, cir. j. Fil'd Feb'y 24, 1876.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obediance thereto, do hereby certify that the following pages, numbered from one to 329 inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Joseph Grafton, plaint-
3 iff in error, and Stephen H. Cummings, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and seventy-six and of the Independence of the said United States the one hundred and first.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

4 The President of the United States of America to the marshal of the southern district of New York, greeting:

We command you that you take Joseph Grafton, defendant, if he shall be found in your district, and him safely keep, so [CAPIAS. L. S.] that you may have his body before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, to be held at the United States court buildings, No. 41 Chambers street, in the city of New York, in the said southern district, on the 18th day of March, 1872, to answer unto Stephen H. Cummings, plaintiff, in a plea of assumpsit and also to a certain bill of the said plaintiff against the said defendant for damage for breach of contract in the sum of seventy thousand dollars, according to the custom of the said court, before the said judges, then and there to be exhibited, and that you have then there this writ:

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New York, the 14th day of March, in the year one thousand eight hundred and seventy-two and of the Independence of the United States the ninety-seventh.

KENNETH G. WHITE, *Clerk.*

BARNEY, BUTLER & PARSONS,
Pl'ff's Attorneys.

5 (Indorsed:) U. S. circuit court for the southern district of New York. Stephen H. Cummings vs. Joseph Grafton. Capias ret. March 18, 1872. Barney, Butler & Parsons, pl'ff's att'ys.

6 Circuit court of the United States of America, in the second circuit, for the southern district of New York.

STEPHEN H. CUMMINGS
vs.
JOSEPH GRAFTON.

On the sixteenth day of March, as yet in the March term, in the year of our Lord one thousand eight hundred and seventy-two.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Stephen H. Cummings, who is a citizen of the State of Maine, plaintiff in this suit, by Barney, Butler and Parsons, his attorneys, complains of Joseph Grafton, who is a citizen of the State of New York, and within the said district, on a plea of assumpsit, for that whereas heretofore, to wit, on the sixteenth day of May, in the year of our Lord one thousand eight hundred and seventy-one, at the township of Gorham, in the county of Coos, and State of New Hampshire, the said plaintiff, by his
7 auctioneer and agent in that behalf, caused to be put up and exposed for sale to the highest bidder, at public auction, a certain tract of land, with the buildings thereon and the furniture therein contained, situate and being in Queen's grant, in said county of Coos and State of New Hampshire, and known as the Glen House, upon and subject to the following amongst other terms and conditions of sale, to wit: that ten days would be allowed to examine the title, within which time the property must be settled for; that five thousand dollars would be required of the purchaser on the spot, that fifteen thousand dollars should be paid by the purchaser on the delivery of the deed for the property; that one-half of the purchase money should be paid on the first

day of September, in the year one thousand eight hundred and seventy-one, and that the remaining balance of the purchase money should be paid on the first day of September, one thousand eight hundred and seventy-two.

8 And the plaintiff in fact says that thereupon, on said exposure to sale, to wit, on the 16th day of May, 1871, at said Gorham, in the State of New Hampshire, the defendant was the highest bidder for the aforesaid property known as the Glen House, with the said lands, buildings and furniture, and was then and there declared to be and became the purchaser thereof for a large sum of money, to wit, the sum of ninety thousand dollars.

And thereupon, to wit, on said 16th day of May, 1871, at said Gorham, in consideration of the premises and of the said purchase, the plaintiff sold and undertook and agreed to convey to the defendant, by good and sufficient deed and instrument of transfer, the aforesaid property, being the said lands, buildings, furniture and appurtenances, according to said terms and conditions of sale, and promised and agreed faithfully to comply on his part with the said terms and conditions.

And thereupon, to wit, on said day last above mentioned, at said Gorham, the defendant, in consideration of the premises and of the sale to him of the said property and of the aforesaid several under-

9 takings and promises of the plaintiff, undertook and then and there faithfully promised the plaintiff to perform and fulfill everything on his part as purchaser to be performed and fulfilled according to said terms of sale, and to take the said property and pay therefor the sum of ninety thousand dollars in manner by said terms of sale required to be paid, and did then and there sign an agreement in writing for the purchase of said property and for the payment of said sum of ninety thousand dollars according to said terms and conditions of sale.

And the plaintiff says that thereupon he caused to be made good and sufficient deeds and instruments of conveyance of the said property to convey and transfer the same by good and sufficient title to the said defendant, and caused the said deeds and instruments to be tendered to the said defendant, but that the said defendant, disregarding his said promise, refused to accept the said deeds or to take the said property.

10 And the plaintiff, in pursuance of the terms and conditions of said sale, thereupon offered and was ready and willing to deliver to the said defendant properly-executed deeds and instruments of conveyance, good and sufficient in law to convey to the defendant the aforesaid property, and offered and was ready and willing to convey said property to said defendant according to the said terms and conditions of sale, and fully to perform and fulfill everything on his part required as aforesaid to be performed or fulfilled, and the plaintiff has in fact fully and faithfully performed on his part everything by the said agreement of sale and the said terms and conditions to be performed. And the plaintiff thereupon required from the defendant payment of the said sum of five thousand dollars and of fifteen thousand dollars, by the said terms and conditions of sale to be paid by the defendant, & has demanded of the def't that he take the said property and comply with the said conditions of purchase on his part.

11 Yet the defendant, not regarding the said conditions nor his said promise and undertaking, but contriving and intending to defraud the plaintiff, did not, nor would at the said sale, or within ten days thereafter, or at any other time, pay to the plaintiff the said pur-

chase-money or any part thereof, but then and there wholly refused, and still neglects and refuses so to do, and afterwards, to wit, on the 26th day of May, in the year aforesaid, wholly refused to complete the said purchase or to take the said property, and wholly discharged the plaintiff from all further performance on his part of his said promises and undertakings, contrary to the said promise and undertaking of said defendant at said Gorham on the day first above mentioned.

And the plaintiff says that in consequence of the defendant's said neglect and refusal he was compelled to and did afterwards expose to sale and sell at public auction the aforesaid property at a loss, upon such subsequent sale, of a great sum, to wit, of the sum of twenty-nine
12 thousand dollars, of all of which the defendant had due notice.

And whereas, also, heretofore, at the said of Gorham, in the State of New Hampshire, on the 16th day of May, 1871, the said plaintiff, by his auctioneer and agent in that behalf, caused to be put up at auction and exposed for sale to the highest bidder certain other property, to wit, a certain tract of land, with the mill, stables, buildings, and appurtenances thereon, and the furniture in said buildings, situate and being in Green's grant, in the county of Coos and State of New Hampshire, and known as the Glen House, upon and subject to the following amongst other conditions of sale, to wit: that five thousand dollars should be paid by the purchaser on the spot at the time of such sale.

And the plaintiff, in fact, says that thereupon on said exposure to sale, to wit, on the 16th day of May, 1871, at said Gorham, the defendant was the highest bidder for said last-mentioned property, known as the Glen House, with the said lands, buildings, and furniture,
13 and was then and there declared to be and became the purchaser thereof for a large sum of money, to wit, for the sum of ninety thousand dollars.

And thereupon, to wit, on said 16th day of May, at said Gorham, in consideration of the promises and of the said purchase, the plaintiff sold, and undertook and agreed to convey to the defendant by good and sufficient deed and instrument of transfer, the property last above mentioned and purchased by the defendant as aforesaid.

And thereupon, to wit, on the said day last above mentioned, at said Gorham, the defendant, in consideration of the promises and of the sale to him of the said last-mentioned property, and of the aforesaid several undertakings and promises of the plaintiff, then and there promised and agreed to pay to the plaintiff forthwith the said sum of five thousand dollars, and then and there signed an agreement for the purpose of said property, and for the payment forthwith and on the spot of said sum of five thousand dollars.

14 And the plaintiff says, that thereupon he caused a demand to be made upon the defendant for the payment of said sum of five thousand dollars, and required the defendant to pay the same, but that the defendant, not regarding the said conditions of sale, nor his said undertaking, promises, or agreement, did not nor would, when thereunto requested, nor at any time, pay the said sum of five thousand dollars, nor any part thereof; but then and there refused, and still neglects and refuses, to pay said sum, or any part thereof.

And whereas also, heretofore, the said defendant afterwards, to wit, on the 16th day of May, 1871, at said Gorham, in the State of New Hampshire, was indebted to the plaintiff in the further sum of ninety thousand dollars for certain messuages, tenements, and premises, with the appurtenances, before that time bargained and sold by the said

plaintiff to the said defendant, at his special instance and request, and being so indebted to the said defendant in consideration thereof,
15 afterwards, to wit, on the day and year last aforesaid, at said Gorham, to wit, at the city of New York, undertook and then and there faithfully promised to said plaintiff to pay him the said last mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, heretofore the said defendant, afterwards, to wit, on the 16th day of May, 1871, at said Gorham, in the State of New Hampshire, was indebted to the plaintiff in the further sum of five thousand dollars for certain other messuages, tenements, and premises, with the appurtenances, before that time bargained and sold by the said plaintiff to the said defendant, at his special instance and request; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at said Gorham, to wit, at the city of New York, within said district, undertook and then and there faithfully promised the said plaintiff to pay him
16 the said last-mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

Yet the said defendant, though often requested so to do, has not paid the sums of money above mentioned, nor any part thereof, or of either thereof to the plaintiff, but has hitherto neglected and refused, and still neglects and refuses, so to do, to the damage of the plaintiff in all in the sum of twenty thousand dollars, wherefor' he brings his suit.

BARNEY, BUTLER & PARSONS,
Attorneys for the Plaintiff.

17 Circuit court of the United States for the southern district of New York.

JOSEPH GRAFTON
ads.
STEPHEN H. CUMMINGS.

And the said Joseph Grafton, by Platt, Gerard & Buckley, his attorneys, comes and defends the wrong and injury, when, &c., and says that the first count of the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action against him, the said defendant, and that he, the said defendant, is not bound by law to answer the same, and this he is ready to verify: Wherefore, for a want of sufficient first count in the said declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his action as aforesaid.

18 And for a further plea in this behalf as to the said second, third, and fourth counts of the said declaration, the said defendant comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, and the said plaintiff doth the like, &c.

And for a further plea in this behalf, to the said second, third, and fourth counts, the said defendant, by leave of the court for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that

the said plaintiff, after the said several times in the said declaration mentioned and before the commencement of this action, sold and conveyed the said lands and premises in the said counts of the said declaration specified to a third person, other and different from this
19 defendant, and this he, the said defendant, is ready to verify:

Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And for a further plea in this behalf to the said second, third, and fourth counts, the said defendant, by leave of the court for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, the said defendant, because he says that the said plaintiff at the said several times in the said counts of the said declaration mentioned, and at the time of the commencement of this action, was not seized and possessed of a good and valid title in fee-simple of said lands and premises, freed from mortgages and other liens, and that the said lands and premises at the time aforesaid were subject to mortgages and other liens, and the said plaintiff had no title thereto in fee-simple.

Wherefore he prays judgment if the said plaintiff ought to
20 have or maintain his aforesaid action thereof against him, &c.

And for a further plea in this behalf to the said second and fourth counts, the said defendant, by leave of the court for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said alleged agreement for the payment forthwith, and on the spot, of said sum of five thousand dollars was a privilege and advantage to and for the said plaintiff, and for his own peculiar benefit, and said plaintiff at the said times in the said second and fourth counts mentioned then and there waived said obligation and agreement of this defendant for the payment forthwith and on the spot of said sum of five thousand dollars, and thereupon released and discharged him from the payment of the same forthwith or on the spot, and gave up and forbore the
21 privilege belonging to him, the said plaintiff, of demanding and receiving said sum of five thousand dollars forthwith, and deferred the payment thereof until the 26th day of May then following, and did not cause a demand to be made on this defendant for said sum of five thousand dollars previous to said 26th of May, and did not require this defendant to pay the same in manner and form as in the said second and fourth counts of said declaration alleged.

Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

JOSEPH GRAFTON.

PLATT, GERARD & BUCKLEY,
Def't's Att'ys.
J. W. GERARD, Junior,
Counsel.

22 Circuit court of the United States for the southern district of New York.

STEPHEN H. CUMMINGS
ag'st
JOSEPH GRAFTON.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Joseph Grafton, the defendant above named, being duly sworn, says

that he has a good and substantial defence upon the merits of this action, as he is advised by his counsel and verily believes.

JOSEPH GRAFTON.

Sworn to before me this 24th day of April, 1872.

[L. S.] HENRY T. LIPPOLD,
Notary Public, N. Y. Conty.

I, the undersigned, a counsellor of the circuit court of the United States for the southern district of New York, do hereby certify that I have advised Joseph Grafton, the defendant above named, as stated by him in his foregoing affidavit; and I do further certify that the
23 special plea and demurrer by him above interposed are, in my opinion, well founded.

New York, April 24th, 1872.

J. W. GERARD, JUNIOR,
Of Counsel.

24 Circuit court of the United States, in the second circuit, for the southern district of New York.

STEPHEN H. CUMMINGS
vs.
JOSEPH GRAFTON.

And the plaintiff saith the said first count of the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof against the said defendant, and the said plaintiff is ready to verify and prove the same, as the court here shall direct and award.

Wherefore, inasmuch as the said defendant hath not answered the said first count of the said declaration, nor hitherto in any manner denied the same, the said plaintiff prays judgment and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

25 And the said plaintiff, as to the plea of the said defendant by him above pleaded, and whereof he hath put himself upon the country, doth the like.

And the said plaintiff, as to the plea of the said defendant secondly above pleaded to the second, third, and fourth counts of the said plaintiff's declaration, saith that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he saith that the said plaintiff, before the time when the said lands and premises were sold and conveyed, as in the said plea stated, tendered to the said defendant good and sufficient deeds and instruments of transfer of the said lands and premises, and offered and was ready to convey and transfer to the said defendant by a good, valid, and sufficient title, and offered to perform, and did perform, all and everything by him, the said plaintiff, to be performed, and demanded of the defendant payment
26 of the several sums in the said declaration mentioned, and the performance on his part of the several things by said defendant agreed to be performed; but the said defendant refused to accept the deeds and instruments tendered as aforesaid, and refused to take the

said lands and premises or to accept a transfer or conveyance thereof, and refused to comply with the terms of his contract or to perform with reference thereto the things that ought by him to be performed, or to pay any of the said sums of money, and thereupon wholly discharged the plaintiff from the further performance on his part of the several things by him undertaken. That thereupon the plaintiff gave notice to the said defendant that he, the said plaintiff, would proceed to a resale of the said lands, premises, and property, and would hold him, the said defendant, responsible for any deficiency that might arise, and for any damage that might accrue to the plaintiff by reason thereof; that afterwards, in pursuance of such notice and upon due notice given to
27 the said defendant, the plaintiff did resell the said lands and premises at public auction, whereby a deficiency arose and damage accrued to the plaintiff in the sum of thirty thousand dollars; and this the said plaintiff is ready to verify. Wherefore he prays judgment, and his damages by him sustained on occasion of the non-performance of the said several promises and undertakings, in the said declaration mentioned, to be adjudged to him, &c.

And the said plaintiff, as to the plea of the said defendant by him thirdly above pleaded to the second, third, and fourth counts of the said declaration, saith that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendant, and that he, the said plaintiff, is not bound by law to answer the same; and this he is ready to verify.

28 Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment, and his damages by reason of the not performing of the said several promises and undertakings, in the said declaration mentioned, to be adjudged to him, &c.

And the said plaintiff, as to the plea of the said defendant by him lastly above pleaded to the second and fourth counts of the said declaration, saith that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof, because he saith that the agreement for the payment of five thousand dollars in said plea mentioned was not a privilege and advantage as in said plea alleged, and that the plaintiff did not waive any obligation or agreement of the defendant, and did not release or discharge the defendant, and did not give up or forbear any privilege belonging to him, the said plaintiff, and did not defer any payment, or fail to make or cause to be made demand for
29 said sum, or fail to require payment thereof, in manner and form as the defendant in his said plea has alleged.

And this the said plaintiff prays may be inquired of by the country.

BARNEY, BUTLER & PARSONS,
Plaintiff's Attorneys.

I, the undersigned, a counsellor of the circuit court of the United States for the southern district of New York, do hereby certify that the demurrer by the plaintiff interposed to the defendant's plea is, in my opinion, well founded.

New York, May 7th, 1872.

THO'S H. HUBBARD,
Of Counsel for Pl'ff.

30 Circuit court of the United States for the southern district of New York, in the second circuit.

STEPHEN H. CUMMINGS
ag'st
JOSEPH GRAFTON.

And the said defendant says that his said plea thirdly by him above pleaded, and the matters therein contained in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against him, the said defendant, and he, the said defendant, is ready to verify and prove the same when, where, and in such manner as the court here shall direct and award.

Wherefore, inasmuch as the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, the said defendant prays judgment and that the said plaintiff be barred from having or maintaining his aforesaid action against him, the said defendant.

31 PLATT, GERARD & BUCKLEY,
Def't's Att'ys.

I, the undersigned, a counsellor of the circuit court of the United States for the southern district of New York, do hereby certify that the joinder in demurrer above interposed by the defendant is, in my opinion, well formed.

New York, May 18, 1872.

J. N. PLATT,
Of Counsel for Def't.

32 Circuit court of the United States for the southern district of New York.

JOSEPH GRAFTON
ads.
STEPHEN H. CUMMINGS.

And the said Joseph Grafton, by Platt, Gerard & Buckley, his attorneys, comes and defends the wrong and injury when, &c., and says that he did not undertake and promise in manner and form as the said plaintiff has above thereof complained against him, and of this he puts himself upon the country, and the said plaintiff doth the like, &c.

And for a further plea in this behalf, the said defendants by leave of the court, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him because he says that the said plaintiff after the said several times in the said declaration mentioned, and before the commencement

33 of this action, sold and conveyed the said land and premises in the said counts of the said declaration specified to a third person other and different from this defendant, and this he, the said defendant, is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And for a further plea in this behalf to the said second and fourth counts of the said declaration, by leave of the court for this purpose first had and obtained according to the form of the statute in such case made and provided, the said defendant says that the said plaintiff ought not

to have or maintain his aforesaid action thereof against him, because he saith that on the said 16th day of May in the said second and fourth counts specified, after the defendant had promised and agreed to pay to the said plaintiff the said sum of five thousand dollars forthwith, the said plaintiff in consideration that the defendant would agree to purchase the said lands and premises as specified in the said count of said declaration and would
34 sign the contract therefor, and for the payment of said sum of five thousand dollars the said plaintiff then and there in consideration of the premises promised and agreed to and with this defendant to waive the payment of the said sum of five thousand dollars until the 26th day of the said month of May, at which said last-mentioned day the said plaintiff then and there promised and agreed to convey the said lands and premises to this defendant by a good title in fee-simple, free of all incumbrance, and in consideration of the premises it was also further promised and agreed by and between the said plaintiff and this defendant that in the event that the said plaintiff should not be able on the said last-mentioned date to convey the said lands and premises to this defendant by good title in fee-simple, free of all incumbrances that this defendant should thereupon be released and discharged from the payment of said sum of five thousand dollars, and this defendant avers that neither on the said 26th day of May, nor at any prior or sub-
35 sequent time up to the commencement of this action, was the plaintiff able to convey the said lands and premises by good title in fee-simple and free of all incumbrances, nor did he ever offer so to do, whereby this defendant became and was released and discharged from the payment of the said sum of five thousand dollars, and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And for a further plea in this behalf to the said second and fourth counts, this said defendant, by leave of the court for this purpose first had and obtained according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him because he says that the said alleged agreement for the payment forthwith and on the spot of said sum of five thousand dollars was a privilege and advantage to and for the said plaintiff and for his own peculiar benefit, and said plaintiff, at the said times
36 in the said second and fourth counts mentioned, then and there waived said obligation and agreement of this defendant for the payment forthwith and on the spot of said sum of five thousand dollars, and thereupon released and discharged him from the payment of the same forthwith, or on the spot, and gave up and forebore the privelege belonging to him, the said plaintiff, of demanding and receiving said sum of five thousand dollars forthwith, and deferred the payment thereof until the 26th day of May then following, and did not cause a demand to be made on this defendant for said sum of five thousand dollars previous to said 26th of May, and did not require this defendant to pay the same in manner and form as in the said second and fourth counts of the said declaration alleged, and this he is ready to verify.

Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

And this defendant for a further plea in this behalf to the said declaration, by leave of the court for this purpose first had and ob-
37 tained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or main-

tain his aforesaid action thereof against him, because he saith that on the said 16th day of May, in the year 1871, the said plaintiff in consideration that this defendant would purchase of him, the said plaintiff, the messuages, tenements, and premises, with the appurtenances, in the third count of said declaration specified, for the said sum of ninety thousand dollars, and would promise and agree to become indebted to the said plaintiff therefor, and to pay said plaintiff therefor, and which are the same indebtedness and the same promises and undertakings referred to and set forth in said declaration, then and there agreed to and with this defendant that he would on the said 26th day of May, in the year 1871, convey the said messuages, tenements, and premises, with the appurtenances, to this defendant by good title in fee simple, absolute, free from all mort-
gages, liens, and other incumbrances, and in consideration of
38 the premises it was also further promised and agreed by and between the said plaintiff and the defendant that, in the event that the said plaintiff should not be able on the said last mentioned date to convey the said lands and premises to this defendant by good title in fee simple, free of all incumbrances, that this defendant should thereupon be released and discharged from the said contract, indebtedness, promises, and undertakings, and this defendant further saith that the said plaintiff did not and would not perform his part of the aforesaid contract and agreement, promises, and undertakings. And the said plaintiff never conveyed and never offered to convey the said messuages, tenements, and appurtenances, or any part thereof, by good title in fee simple or unincumbered, but on the contrary thereof from the first above mentioned date, and continually up to the commencement of this action, said plaintiff was unable to convey to this defendant, or to cause
to be conveyed to this defendant, the said messuages, tenements,
39 or appurtenances, or any part thereof, by good title in fee simple, absolute, free from incumbrances, and this he the said defendant is ready to verify.

Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

PLATT, GERARD AND BUCKLEY,
Pff's Attys.

GEO. W. DENTON,
Of Counsel.

40 Circuit court of the United States for the southern district of New York.

STEPHEN H. CUMMINGS
ag'st
JOSEPH GRAFTON.

James N. Platt, being duly sworn, deposes and says that he is one of the attorneys and counsel for the defendant, Joseph Grafton, in the above action; that said defendant has a good and substantial defence upon the merits of this action, as deponent as his counsel has advised him. That said defendant is now absent from the United States, which is the reason why this affidavit is not made by him.

(Signed) J. N. PLATT.

Sworn to before me this 27th day of March, 1873.

[NOTARY'S SEAL.]

HENRY F. LIPPOLD,
Notary Public, N. Y. County.

I, the undersigned, a counsellor of the circuit court of the United States for the southern district of New York, do hereby certify
41 that I have advised Joseph Grafton, the defendant above named, as stated in the foregoing affidavit; and I do further certify that the special pleas by him above interposed are, in my opinion, well founded.

New York, March 27th, 1873.

(Signed) J. N. PLATT.

42 Circuit court of the United States of America in the second circuit, for the southern district of New York.

STEPHEN H. CUMMINGS }
vs. }
JOSEPH GRAFTON. }

1st. And the said plaintiff, as to the plea of the said defendant by him above pleaded and whereof he hath put himself upon the country, doth the like, &c.

2nd. And the said plaintiff, as to the plea of the said defendant secondly above pleaded, saith that the said plaintiff, by reason of anything therein by the said defendant alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he saith that the said plaintiff, before the time when the said lands and premises were sold and conveyed as in the said plea stated, tendered to the said defendant good and sufficient deeds and instruments of transfer of the said lands and premises, and offered
43 and was ready to convey and transfer to the said defendant the said lands and premises by a good, valid, and sufficient title, and offered to perform and did perform all and everything by him, the said plaintiff, to be performed, and demanded of the said defendant payment of the several sums in the said declaration mentioned and the performance on his part of the several things by the said defendant agreed to be performed, but the said defendant refused to accept the deeds and instruments tendered as aforesaid, and refused to take the said lands and premises or to accept a transfer or conveyance thereof, and refused to comply with the terms of his contract or to perform with reference thereto the things that ought by him to be performed or to pay any of the said sums of money, and thereupon wholly discharged the plaintiff from the further performance on his part of the several things by him undertaken. That thereupon the plaintiff gave notice to the said defendant that he, the said plaintiff, would proceed to a resale of the said lands and premises, and would hold him, the said defendant,
44 responsible for any deficiency that might arise and for any damage that might accrue to the plaintiff by reason thereof.

That afterwards, in pursuance of such notice and upon due notice given to the said defendant, the plaintiff did so resell the said lands and premises at public auction, and that said sale is the same sale referred to in the defendant's said plea, and that thereby a deficiency arose and the defendant became indebted to the plaintiff as in the said declaration set forth. And this the said plaintiff is ready to verify.

Wherefore he prays judgment and his damages by him sustained on occasion of the non-performances of the said several premises and undertakings in the said declaration mentioned to be adjudged to him, &c.

3rd. And the said plaintiff, as to the plea of the said defendant by him first above pleaded to the second and fourth counts of the said

declaration, saith that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof, because he
45 saith that he did not promise and agree in manner and form as the defendant has therein alleged, and the plaintiff did not waive or agree to waive the payment of the said sum of five thousand dollars, and that it was not promised and agreed by and between the said plaintiff and the said defendant as is in the said plea alleged. And this the said plaintiff prays may be inquired of by the country, and the defendant doth the like.

4th. And the said plaintiff, as to the plea of the said defendant by him secondly above pleaded to the second and fourth counts of the said declaration, says that the said plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof, because he saith that the agreement for the payment of five thousand dollars in said plea mentioned was not a privilege and advantage, as in said plea alleged, and that the plaintiff did not waive any obligation or agreement of the said defendant, and did not release or discharge the defendant,
46 and did not give up or forbear any privilege belonging to him, the said plaintiff, and did not deter any payment or fail to make or cause to be made demand for said sum, or fail to require payment thereof in manner and form as the defendant in his said plea has alleged. And this the said plaintiff prays may be enquired of by the country, and the defendant doth the like, &c.

5. And the said plaintiff, as to the plea of the said defendant by him above pleaded to the said declaration, saith that the said plaintiff by reason of anything by the said defendant in that plea alleged ought not to be barred from having and maintaining his aforesaid action thereof, because he saith that he did not agree, and that it was not promised or agreed by and between the said plaintiff and the defendant in manner and form as is by the said defendant in that plea alleged, and because the plaintiff saith that on the said 16th day of May, 1871, at the time of and prior to the said sale of the said messuages, tenements, and
47 premises with the appurtenances, and as a part of the terms and conditions of said sale to which the said defendant assented, and subject to which he promised and agreed as is in the said declaration set forth, it was stated to the said defendant and announced publicly by the plaintiff that there existed and were outstanding certain mortgage incumbrances upon said premises to the amount of fifty-one thousand dollars or thereabouts, and that the purchaser at the said sale might pay certain of the installments of his purchase-money which by the said terms of sale would be payable in September, 1871, and September, 1872, by assuming and paying, or agreeing to pay, the said mortgage incumbrances, and that any amount of the said purchase-money, after payment of the first instalment of five thousand dollars and the second instalment of fifteen thousand dollars required by said terms of sale, which should not be already secured by mortgage, must be made secure to the satisfaction of the seller. That after the said sale of the
48 said 16th day of May, 1871, and on the same day and prior to May 26, 1871, the defendant requested that the said mortgage incumbrances might be allowed to stand and remain upon said premises, and that he might be permitted to assume the payment thereof according to the conditions and terms of sale as aforesaid, and that the plaintiff would convey the said premises to the said defendant subject to the

said mortgage incumbrances, and the plaintiff assented to the defendant's said request.

And the plaintiff saith that he did perform on his part of aforesaid contract and agreement promises and undertakings, and that he was able, ready, and willing, and offered to convey and to cause to be conveyed the said messuages, tenements, and appurtenances to the said defendant by good title in fee simple absolute and according to the terms and conditions of sale and the request of the said defendant, as aforesaid, but that the defendant wholly refused to take said property or to perform the said contract on his part, and on the said 26 day of
49 May, 1871, wholly discharged the plaintiff from any further performance thereof.

And this the said plaintiff is ready to verify. Wherefore he prays judgment and his damages by him sustained on occasion of the non-performance of the said several promises and undertakings in the said declaration mentioned to be adjudged to him, &c.

BARNEY, BUTLER & PARSONS,
Plaintiff's Attorneys.

50 Circuit court of the United States for the southern district of New York.

Rejoinder to the replication to the second plea arising under refusal and sale at auction.

JOSEPH GRAFTON
ads.
STEPHEN H. CUMMINGS.

And the said defendant, as to the said replication of the said plaintiff to the second plea of him, the said defendant, above pleaded, says that the said plaintiff, by reason of anything in the said replication contained, ought not to have or maintain his action aforesaid against him, the said defendant, because he saith that on the said 16th day of May the said plaintiff, in consideration that this defendant would purchase of him, the said plaintiff, said messuages, tenements, and premises, with the appurtenances and furniture, in the said declaration specified, for the said sum of ninety thousand dollars, and would promise and agree to become indebted to the said plaintiff therefor, and to pay said plaintiff therefor, and which is the same indebtedness and the same promises
51 and undertakings referred to and set forth in the said declaration and in the said replication then and there agreed to, and with this defendant, that he would, on the said 26th day of May, in the year 1871, convey the said messuages, tenements, and premises, with the appurtenances and furniture, to this defendant by good title in fee simple absolute, free from all mortgages, liens, and other incumbrances; and this defendant saith that, although true it is that the said plaintiff did tender to this defendant certain deeds or instruments of transfer of the aforesaid messuages, tenements, and premises, with the appurtenances and furniture, yet that the said plaintiff did not tender to this defendant good or sufficient deeds or instruments of transfer of the said messuages, tenements, and premises, or appurtenances and furniture, nor did he offer, or was he ready to convey or transfer to this defendant the same by a good, valid, or sufficient title, or free of mortgages, liens, or other incumbrances; nor did he offer to perform, nor did he
52 perform, all or everything by him, the said plaintiff, to be per-

formed. On the contrary, this defendant avers the fact to be that at no time up to the commencement of this action was the plaintiff able to convey, or cause to be conveyed, to this defendant a good title to the aforesaid premises, free or clear *or clear* from mortgages, liens, or other incumbrances; and the said plaintiff never offered or tendered any such conveyance or transfer, and this defendant denies that the plaintiff ever tendered to this defendant good or sufficient deeds or instruments of transfer of the said lands or premises or furniture, or offered or was ready to convey or transfer to this defendant, by good, valid, or sufficient title, or offered to perform, or did perform, all or everything by him, the said plaintiff, to be performed in manner and form as the said plaintiff hath above in his said replication to the said second plea of the defendant in that behalf alleged; and of this he, the said defendant, puts himself upon the country, and the said plaintiff doth the like, &c.

53 *Second rejoinder to the replication to the second plea.*

And the said defendant, as to the said replication of the said plaintiff to the second plea of him, the said defendant, above pleaded, by leave of the court here for that purpose first had and obtained, says that the said plaintiff, by reason of anything in said replication contained, ought not to have or maintain his action against him, the said defendant, because he says that the said plaintiff did not give any due or legal notice that he would proceed to a resale of the said lands and premises, nor had the plaintiff any authority to do so, nor did the said plaintiff, in pursuance of such alleged notice, or upon any due notice given to this defendant, resell the said lands and premises, or that, by reason of any deficiency on such alleged sale, this defendant is indebted to the plaintiff; and this defendant avers that, although the said plaintiff did profess to resell the said property, he had no authority so to do, as far as this defendant is concerned, and that said sale was made
54 under terms different from those under which the said lands and premises were sold or intended to be sold to this defendant, which materially affected and depreciated the value of the lands and premises so professed to be resold, and that said pretended resale was fraudulently made, and was made with intent to cheat and defraud this defendant by producing a less amount than that alleged to have been bid by the defendant, so as to leave a large deficiency to remain and to be claimed by the plaintiff against this defendant. And this defendant further saith that after such alleged resale the said premises were not conveyed to the pretended purchasers thereof pursuant to the said terms of sale thereof, but on other and different terms and conditions, and that such conveyances were materially different from those tendered to this defendant, whereby this defendant became freely discharged from any liability on his part on account of any of the matters set forth in the aforesaid declaration and replication, and this he, the said defendant, is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, &c.

55 *Rejoinder to the fifth replication.*

And the said defendant as to the replication of the said plaintiff to the fifth plea of this defendant to the said declaration says that the plaintiff ought not to have or maintain his action aforesaid against him, the said defendant, by reason of anything in said replication contained, be-

cause he saith that it is not true and he denies that on the said sixteenth day of May, A. D. 1871, or at the time of or prior to the said sale of the said messuages and premises, with the appurtenances, or as a part of the terms and conditions of the said alleged sale to which this defendant assented, or subject to which he promised or agreed as is in the said declaration set forth, it was declared by the auctioneer, stated to the defendant, or announced publicly by the plaintiff that there were outstanding the mortgages or encumbrances as in the said replication set forth, or that the purchaser might pay certain instalments of his purchase-money as in said replication set forth, or that said defendant requested as in said replication set forth that the said mortgage encumbrances
56 might be allowed to remain on the premises or that he might be permitted to assume the payment thereof, or that the plaintiff would convey the said premises to him subject to the said mortgage or incumbrances, or that the plaintiff assented to such alleged request of this defendant, or that the plaintiff did perform on his part his *his* part of the said alleged contract or agreement, or that he was able or ready or willing or offered to convey or cause to be conveyed the said messuages, tenements, or appurtenances and furniture to this defendant by a good title in fee-simple absolute, free of incumbrances, according to the terms and conditions of such sale, but this defendant avers the fact to be that the only terms and conditions of the said sale were at the time thereof reduced to writing, and as so reduced to writing at the time of said sale announced as the terms of sale upon which said property was offered to be sold, and were the sole and only terms of sale, and were in the words and figures following, to wit:

57 Terms of sale.

Ten days will be allowed to examine the title, within which time the property must be settled for; $5,000 will be required of the purchaser on the spot, which will be forfeited to the seller if the terms and conditions are not complied with; but the forfeiture of said money does not release the purchaser from his obligation to take the property. Fifteen thousand dollars to be paid on the delivery of the deed and one-half of the purchase-money to be paid Sept. 1st, 1871, the remaining balance to be paid September 1st, 1872. The property is sold subject to the conditions of the sale of the stage route, stages, &c., which are that the proprietors of the route shall have the exclusive business of the house.

This defendant further avers that these were the sole and only terms of sale of the said lands and premises, and that thereupon the said plaintiff required of and received from this defendant the following writing annexed to the said terms of sale and these formed and made
58 the only contract, understanding, or agreement, promise or undertaking, entered into by and between this defendant and the said plaintiff for the sale and purchase of the said lands and premises, and is in the words and figures following, to wit:

GORHAM, N. H., *May* 16, 1871.

I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the 'Glen House' (with the furniture belonging to it), in Green's grant, N. H., and sold at auction on Tuesday, May 16, 1871, at eleven o'clock a. m., and for the sum of ninety thousand dollars, said property being more particularly described in the adver-

tisement hereunto affixed; and I hereby bind myself, my heirs, and assigns to comply with the terms and conditions of the sale as declared by the auctioneer at the time and place of sale.

And this defendant avers that the aforesaid were the only terms of sale upon which said lands and premises were sold, and the only writing signed or entered into by this defendant, and there was no other contract or agreement, promise or undertaking, than as shown by
59 the aforesaid two writings, and that all other declarations or statements set forth in said replication, if made, were merged in and concluded by the aforesaid writings. And this defendant further avers that the aforesaid lands and tenements were situated in the State of New Hampshire, and that contracts for the sale or purchase of lands like the one in suit, and as set forth in the declaration, are required to be entered into in the manner and form prescribed by the statutes of that State, and are not binding and valid upon either party if not so entered into, and that the aforesaid alleged contract was not entered into pursuant to the statutes of the State of New Hampshire, and is invalid and of no binding force, form, or effect whatever; and this he, the said defendant, is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his said action thereof against him the said defendant.

60 Circuit court of the United States for the southern district of New York.

STEPHEN H. CUMMINGS *ag'st* JOSEPH GRAFTON.

CITY AND COUNTY OF NEW YORK,
Southern District of New York, ss:

James N. Platt, being duly sworn, deposes and says that he is one of the attorneys and counsel for the defendant, Joseph Grafton, in the above action; that said defendant has a good and substantial defence upon the merits of this action, as deponent, who is his counsel, has advised him; that said defendant is now absent from the United States, which is the reason why this affidavit is not made by him.

J. N. PLATT.

Sworn to before me this 16th day of December, 1873.
[L. S.] HENRY F. LIPPOLD,
Notary Public N. Y. Co.

I, the undersigned, a counsellor of the circuit court of the
61 United States for the southern district of New York, do hereby certify that I have advised Joseph Grafton, the defendant above named, as stated in the foregoing affidavit. And I do further certify that the special pleas by him above interposed are, in my opinion, well founded.

New York, December 16, 1873.

J. N. PLATT.

62 Circuit court of the United States of America, in the second circuit, for the southern district of New York.

STEPHEN H. CUMMINGS
vs.
JOSEPH GRAFTON.

And the said plaintiff as to the rejoinder of the said defendant to the said replication of the said plaintiff in the said second plea of the said defendant, and whereof the said defendant hath put himself upon the country doth the like.

And the said plaintiff as to the second rejoinder of the said defendant to the said plaintiff's replication to the second plea, saith that the said plaintiff by reason of anything by the said defendant in that rejoinder alleged, ought not to be barred from having and maintaining his aforesaid action thereof, because he saith that the resale therein mentioned was made by the plaintiff with authority so to do, and was not made under terms different from those under which the said
63 lands and premises were sold to the defendant which materially affected or depreciated the value thereof, and the said resale was not made fraudulently or with intent to cheat or defraud the defendant as the defendant has therein alleged, and the said premises were not conveyed as the said defendant has therein alleged, and were not conveyed on other or different terms and conditions than the said terms of sale, or by conveyances materially different from those tendered to the defendant, or that by reason of anything in said plea alleged the defendant became discharged from liability on his part. And this the said plaintiff prays may be enquired of by the country, and the defendant doth the like, &c.

And the said plaintiff as to the rejoinder of the said defendant to the plaintiff's replication to the fifth plea of the defendant, saith that the said plaintiff by reason of anything by the said defendant in that rejoinder alleged, ought not to be barred from having and maintaining his aforesaid action thereof, because he saith that it is not true
64 that the only terms and conditions of said sale were at the time thereof reduced to writing and as so reduced to writing announced as the terms of sale upon which said property was offered to be sold, and the sole and only terms of sale, and although true it is that certain portions of the terms of sale were reduced to writing as is mentioned in said plea, and that the defendant signed a memorandum of his purchase as is therein stated, yet the terms and conditions of sale and the contract, understanding, and agreement, were such as is alleged by the plaintiff in his said replication.

And the plaintiff saith that it is not true that the said contract is under the statutes of the State of New Hampshire invalid or of no binding force, form, or effect.

And this the plaintiff prays may be enquired of by the country and the defendant doth the like, &c.

Dated New York, December 31st, 1873.

BARNEY, BUTLER, & PARSONS,
Attorneys for Plaintiff.

65 (Indorsed:) U. S. circuit court, south. dist. of N. Y. Stephen H. Cummings vs. Joseph Grafton. (Copy.) Pleadings.

66 U. S. circuit court, southern dist.

STEPHEN H. CUMMINGS, PLAINTIFF,
against
JOSEPH GRAFTON, DEFENDANT.

We consent that Butler, Stillman, & Hubbard be substituted in our place as attorneys for the plaintiff in the above-entitled action, and that an order to that effect be entered.
Dated New York, December 31st, 1873.

BARNEY, BUTLER & PARSONS,
Plff's Attorneys.

On reading and filing the foregoing consent,
Ordered, That Butler, Stillman & Hubbard be, and they are hereby, substituted in place of Barney, Butler & Parsons, as attorneys for the plaintiff in the above-entitled action.
Dated New York, January 2nd, 1874.

67 (Indorsed:) U. S. circuit court, south. dist. Stephen H. Cummings, pl'ff, against Joseph Grafton, def't. Consent and order of substitution. Butler, Stillman & Hubbard, pl'ff's att'ys, 111 Broadway (Trinity Building), N. Y. City.

Due service of a copy within order is hereby admitted.
Dated N. Y., March 30th, 1874.

PLATT, GERARD & BUCKLEY,
Def't's Att'ys.

Please take notice that the within is a copy of an order duly tendered herein in the office of the clerk of the circuit court of the United States for the southern dist. of N. Y., second circuit, on the 7th day of Jan'y, 1874.
Dated N. Y., March 30th, 1874.
Yours, &c.,

BUTLER, STILLMAN & HUBBARD,
Plff's Att'ys.

To Mess'rs PLATT, GERARD & BUCKLEY,
Def't's Att'ys.

68 THURSDAY, *November 19th*, 1874.

The court meets, &c.
Present, Hon. Judge Shipman.

STEPHEN H. CUMMINGS
vs.
JOSEPH GRAFTON.

This case being still on trial, the jurors are called and severally answer to their names.
M'r Vanderpoel concludes his argument on part of the defendant.
M'r William A. Butler sums up on the part of the plaintiff.
Charge is thereupon given by the court to the jury, who retire under charge of an officer duly qualified to attend them, and on their return say that they find a verdict for the plaintiff in the sum of fifteen thousand dollars, and interest on same, amounting to $3,659.43, in the aggre-

gate eighteen thousand six hundred and fifty-nine dollars and forty-three cents, and so they say all.

69 (Indorsed:) U. S. circuit court. Joseph Grafton ads. Stephen H. Cummings. Extract from minutes of trial & verdict. Platt & Gerard, def'ts att'ys. To Butler, Stillman & Hubbard, esq'rs, pl'ff's att'ys.

70 U. S. circuit court, southern district of New York.

STEPHEN H. CUMMINGS }
vs. }
JOSEPH GRAFTON. }

This cause and the issues therein having been regularly brought on for trial before the Hon. Nathaniel D. Shipman, judge, and a jury, on the 13th day of November, 1874, at a regular jury term of this court, held in and for the southern district of New York, and the issues having been tried, and a verdict for the plaintiff having been duly rendered on the 19th day of November, 1874, for the sum of fifteen thousand dollars, and interest on same, amounting to three thousand and six hundred and fifty-nine $\frac{43}{100}$, in the aggregate eighteen thousand six hundred and fifty-nine dollars and forty-three cents. It is now, on motion of Butler, Stillman & Hubbard, plaintiff's attorneys, adjudged and decreed that Stephen H. Cummings, the plaintiff, recover of Joseph Grafton, defendant, the sum of eighteen thousand six hundred and
71 fifty-nine $\frac{43}{100}$ dollars, found by the jury, with one hundred and
18,659 43 sixty-two dollars and twenty-five cents costs, and disburse-
162 25 ments as taxed by the clerk of this court, and twelve hundred
18,821 68 and ninety-four $\frac{96}{100}$ dollars, as per order of court, amounting in
1,294 96 the aggregate to the sum of twenty thousand one hundred &
20,116 64 sixteen $\frac{64}{100}$ dollars, and that the said plaintiff have execution therefor.

Judgment signed this thirteenth day of November, 1875.

R. E. STILWELL,
Deputy Clerk.

72 (Indorsed:) U. S. circuit court, south'n dist. of New York. Stephen H. Cummings vs. Joseph Grafton. Judgment roll. Butler, Stillman & Hubbard, pl'ff's att'ys, 111 Broadway, N. Y. Filed Nov. 13, 1875.

73 U. S. circuit court for the southern district of New York.

STEPHEN H. CUMMINGS }
ag'st }
JOSEPH GRAFTON. }

And now, on this day, to wit, the 13th day of November, 1874, before the Hon. Nathaniel Shipman, at a circuit court held at the city of New York, came as well the said defendant, and his attorneys and counsel, as the said plaintiff and his attorneys and counsel, and the jurors being called, likewise came, and after being elected, tried, and sworn to try the issues joined in this action, the plaintiff gave evidence to prove that on the 16th day of May, 1871, the real estate known as the Glen House property, which was a large summer hotel in the State of New Hampshire, and the furniture in said house, were sold at public auction.

74 The legal title of two-thirds of the real estate stood upon the land records of the county wherein it was situated in the name of James M. Thompson, theretofore deceased, and the legal title of one-third of the real estate stood in the name of Stephen H. Cummings, the complainant.

The one-third of the property standing in the name of Cummings had been purchased with the individual funds of the plaintiff from M'r Thompson, under an agreement that Cummings and Thompson should form a partnership, which was thereupon formed, and in which Thompson had two-thirds and Cummings one-third interest, and the said property was used and treated as partnership property.

Prior to the death of James M. Thompson the Glen House had been managed and conducted as a large summer hotel by M'r Thompson and M'r Cummings, as partners, in the name of J. M. Thompson
75 & Co.

By the terms of the partnership, which was a verbal one, M'r Thompson was to have two-thirds of the profits and M'r Cummings was to have one-third, and they were to share the losses in the same proportion.

On the death of M'r Thompson, the surviving partner undertook to liquidate the business of the copartnership, and gave to the administrator of M'r Thompson a bond mentioned below, and thereupon continued in possession of the partnership property.

The auction sale was conducted by one A. R. Walker, at Gorham, in the State of New Hampshire. The said Walker had died before said trial. M'r Walker was employed as auctioner by the plaintiff for that purpose, and the real estate known as the Glen House property, and furniture, were bid off by the defendant at the sum of $90,000.

76 The defendant, then and there, signed the agreement of purchase, which is in these words:

No. 1.—*Pl'ff's Ex. E.*

I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the Glen House, with the furniture belonging to it, in Green's grant, New Hampshire, and sold at auction, Tuesday, May 16th, 1871, at 11 o'clock a. m., and for the sum of ninety thousand dollars, the said property being more particularly described in the advertisement hereunto affixed, and I hereby bind myself, my heirs, and assigns, to comply with the terms and conditions of the sale as declared by the auctioneer at the time and place of sale.

(Signed) JOSEPH GRAFTON.

Upon the margin of said agreement were written and printed the following:

Terms of sale.

Ten days will be allowed to examine the title, within which time
77 the property must be settled for; $5,000 will be required of the purchaser on the spot, which will be forfeited to the seller if the terms and conditions are not complied with; but the forfeiture of said money does not release the purchaser from his obligation to take the property. Fifteen thousand dollars to be paid on the delivery of the deed, and one-half of the purchase money to be paid Sept. 1, 1871, the remaining balance to be paid Sept. 1, 1872.

The property is sold subject to the conditions of the sale of the stage route, stages, &c., which are that the proprietors of the route shall have the exclusive business of the house.

The advertisement referred to in the foregoing paper as being thereunto affixed was as follows:

Glen House at auction.

The famous summer resort at the foot of Mount Washington, known as the Glen House, together with the land, furniture, mill and out-
78 buildings, will be sold at public auction, at Gorham, N. H., Tuesday, May 16, 1871, at 11 o'clock a. m., May 2, 1871.

Valuable hotel property for sale.

The favorite summer resort, known as the Glen House, situated at the foot of M't Washington, and at the commencement of the carriage road to the summit, will be offered for sale, together with the land, containing about one thousand acres (well timbered). All the outbuildings, stable, and mill on the same, also the furniture, staging, mountain carriages, horses, &c. The house contains some two hundred and twenty-five rooms, capable of accommodating between four and five hundred guests. The whole property, if not disposed of at private sale previous to the first of May, will be sold at public auction to close the estate of the late J. M. Thompson.

79 Notice of the time and place of sale will be given hereafter.

Any person desirous of seeing the property, which is in thorough repair, or wishing to make any enquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cumming, Falmouth Hotel, Portland, Maine.

The paper when put in evidence was endorsed "A. R. Walker, auctioneer and agent for bothe parties." And the terms of sale which are heretofore mentioned were printed and written upon the margin. The property had been advertised through a season before the sale, and the 16th of May, 1871, agreed upon between the plaintiff and the administrator of Thompson as the best time to sell. The administrator was present at, sanctioned, and approved of said auction sale. No other paper writing was subscribed or signed by the defendant. Subsequent-
80 ly, and prior to May 16th, 1871, three deeds, of which the following are copies, were prepared and duly executed by the plaintiff, and by James W. Weeks, as administrator, &c., of J. M. Thompson, deceased, and by M'r's Catherine W. Thompson, widow of the said J. M. Thompson, deceased, and were tendered by the plaintiff to defendant on the 26th day of May, 1871, in the city of Boston.

The deeds tendered are as follows:

Know all men by these presents that I, Catherine W. Thompson, of Green's grant, in the county of Coos, and State of New Hampshire, for and in consideration of the sum of one hundred dollars to me in hand before the delivery hereof well and truly paid by Joseph Grafton, of the city, county, and State of New York, have remised, released, and forever quitclaimed, and by these presents do remise, release,
81 and forever quitclaim unto the said Joseph Grafton and his heirs and assigns forever, a certain tract of land situated in the county

of Coos, and State of New Hampshire, and being part of Green's grant, described as follows, to wit: Beginning at the mouth of Nineteen-mile Brook, so-called, on said Green's grant; thence up the centre of said brook till it strikes the line of said grant near the southeast corner thereof; thence westerly on the line of said grant to the southwest corner thereof; thence on the line of said grant northerly so far as that a line parallel with the southerly line of said grant will strike the mouth of said Nineteen-mile Brook where it empties into the Peabody River, at the place of beginning; being all that part of said Green's grant lying southerly and westerly of said Nineteen-mile Brook, containing 800 acres, more or less. Being the same premises conveyed to the late Joseph M. Thompson, deceased, by John Bellows by deed dated April 1st, 1852, recorded in the Coos registry of deeds, vol. 49, pages
82 409 and 410. To have and to hold the said premises, with all the privileges and appurtenances thereunto belonging to the said Joseph Grafton and his heirs and assigns forever. And I do hereby covenant with the said Joseph Grafton, that I will warrant and defend the said premises to him, the said Joseph Grafton and his heirs and assigns, against the lawful claims and demands of any person or persons claiming by, from, or under. And I do hereby release, discharge, and waive all such rights of exemption from attachment and levy or sale on execution, and such other rights whatsoever in said premises and in each and every part thereof as my family homestead, as are reserved or secured to me by the statute of the State of New Hampshire, passed July 4th, 1851, entitled "An act to exempt the homestead of families from attachment and levy or sale on execution," or by any other statute or statutes of said State.

83 In witness whereof I have hereunto set my hand and seal the 16th day of May, in the year of our Lord 1871.

CATHERINE W. THOMPSON. [SEAL.]

JONATHAN JEWELL.
A. S. TWITCHELL.

STATE OF NEW HAMPSHIRE,
Coos.

MAY 23, A. D. 1871.

Personally appeared the above-named Catherine W. Thompson and acknowledged the foregoing instrument to be voluntary act and deed.

A. S. TWITCHELL,
Justice of the Peace.

Know all men by these presents that I, James W. Weeks, administrator of the estate of Joseph M. Thompson, late of Green's grant, in the county of Coos and State of New Hampshire, deceased, intestate, by virtue of a license from the court of probate of said county of Coos, holden at Lancaster on the 4th day of April, 1871, authorizing me to sell
84 at public auction the real estate of said deceased, to pay the debts existing against said estate with incidental charges, and in consideration of the sum of forty-six thousand dollars to me paid by Joseph Grafton of the city, county, and State of New York, do sell and convey to the said Joseph Grafton and his heirs forever, two-thirds part of a certain tract of land situated in said county of Coos, and being part of Greene's grant ,described as follows, to wit: Beginning at the mouth of

Nineteen-mile Brook, so called on said Green's grant; thence up the centre of said brook until it strikes the line of said grant near the south-east corner thereof; thence westerly on the line of said grant to the southwest corner thereof; thence on the line of said grant northerly so far as that a line parallel with the southerly line of said grant will strike the mouth of said Nineteen-mile Brook where it enters into the
85 Peabody River at the place of beginning, being all that part of said Green's grant lying southerly and westerly of said Nineteen-mile Brook, containing eight hundred acres more or less, being the same premises conveyed to the late Joseph M. Thompson, deceased, by John Bellows, by deed dated April 1st, 1852, recorded in the Coos registry of deeds, vol. 49, page 409 and 410.

This sale is made subject to the conditions of the sale of the stage and mountain routes, horses and carriages, connected with the Glen House situated upon said premises, which are that the proprietors of said Glyn House shall allow the proprietors of said stage-routes and property to have the exclusive staging, livery, and stable business of said Glyn House.

To have and to hold said premises to the said grantee and his heirs forever.

86 And I do in my said capacity covenant with said grantee and his heirs that said Joseph M. Thompson died rightfully seized of said premises; that I am duly authorized by said license to sell and convey the same in manner aforesaid; that in making said sale I have complied with the law in all things, and that I will warrant said premises to said grantee and his heirs against the lawful claims of all persons claiming under me.

Witness my hand and seal this seventeenth day of May, A. D. 1871.

JAMES W. WEEKS. [SEAL.]
Administrator.

Signed, sealed, and delivered in presence of us—
HENRY HEYWOOD.
T. S. UNDERWOOD.

STATE OF NEW HAMPSHIRE,
Coos County, ss:

This 22d day of May, 1871, personally appeared James W. Weeks and acknowledged the above instrument by him signed to be his free act and deed.

87 Before me.

HENRY HEYWOOD,
Justice of the Peace.

Know all men by these presents that we, Stephen H. Cummings and Harriet N. Cummings, both Portland, in county of Cumberland, and State of Maine, for and in consideration of the sum of twenty-three thousand dollars, to us in hand before the delivery hereof well and truly paid by Joseph Grafton, of the city, county, and State of New York, the receipt whereof we do hereby acknowledge, have granted, bargained, and sold, and by these presents do give, grant, bargain, sell, alien, and enfeoff, convey and confirm unto the said Joseph Grafton and his heirs and assigns forever one-third part of a certain tract of land situated in the county of Coos and State of New Hampshire, and being part of Green's grant, described as follows, to wit: Beginning at
88 the mouth of Nineteen-mile Brook, so called on said Green's

grant; thence up the centre of said brook till it strikes the line of said grant near the southeast corner thereof; thence westerly on the line of said grant to the southwest corner thereof; thence on the line of said grant northerly, so far as that a line parallel with the southerly line of said grant will strike the mouth of said Nineteen-mile Brook where it empties into the Peabody River at the place of beginning, being all that part of said Green's grant lying southerly and westerly of said Nineteen-mile Brook, being one-third part of the same premises conveyed to the late Joseph M. Thompson, deceased, by John Bellows by deed dated April 1st, 1852, recorded in the Coos registry of deeds, vol. 49, pages 409 & 410, subject to mortgages to Nathaniel Wesson, of Salem, Mass., to Nathan Cummings, of Portland, Maine, and Thomas R. Jones.

89 This sale is made subject to the conditions of the sale of the stage and mountain routes, horses and carriages, which are that the proprietors of the Glen House shall allow the proprietors of said stage property to have the exclusive staging, livery, and stable business of said house.

To have and to hold the said granted premises, with all the privileges and appurtenances to the same belonging, to him, the said Joseph Grafton, and his heirs and assigns, to his and their only proper use and benefit forever.

And I, the said Stephen H. Cummings, and my heirs, executors, and administrators, do hereby covenant, grant, and agree*d* to and with the said Joseph Grafton, and his heirs and assigns, that until the delivery hereof I am the lawful owner of the said premises, and am seized and possessed thereof in my own right in fee simple, and have full

90 power and lawful authority to grant and convey the same in manner aforesaid; that the said premises are free and clear from all and every encumberance whatsoever, and that I and my heirs, executors, and administrators shall and will warrant and defend the same to the said Joseph Grafton, and his heirs and assigns, against the lawful claims and demands of any person or persons whomsoever.

And I, Harriet N. Cummings, wife of the said Stephen H. Cummings, in consideration aforesaid, do hereby relinquish my right of dower in the before-mentioned premises. And we and each of us do hereby release, discharge, and waive all such rights of exemption from attachment and levy or sale on execution, and such other rights whatsoever in said premises, and in each and every part thereof, as our fam-

91 ily homestead, as are reserved or secured to us or either of us by the statute of the State of New Hampshire passed July 4, 1851, entitled "An act to exempt the homestead of families from attachment and levy or sale on execution," or by any other statute or statutes of said State.

In witness whereof we have hereunto set our hands and seals this 16th day of May, in the year of our Lord 1871.

STEPHEN H. CUMMINGS. [SEAL.]
HARRIET N. CUMMINGS. [SEAL.]

Signed, sealed, and delivered in the presence of us—
WM BURNS, HENRY HEYWOOD, to S. H. C.
ELEANOR C. LUFKIN, T. T. SNOW, to H. N. C.

STATE OF NEW HAMPSHIRE,
Coos *ss:*

MAY 16, A. D. 1871.

Personally appeared the above named Stephen H. Cummings acknowledged the foregoing instrument to be his voluntary act and deed.

Before me,

Justice of the Peace.

92 STATE OF MAINE,
Cumberland County, ss:

This 24th day of May, 1871, personally appeared Harriet N. Cummings, and acknowledged the above deed by her subscribed to be her voluntary act and deed.

Before me,

T. T. SNOW,
Justice of the Peace.

At the same time the plaintiff tendered to the defendant the bill of sale of the furniture and personal property in and about the premises which is hereinafter mentioned. The defendant refused to accept these deeds and complete the purchase, and thereupon one Minot, who was with him at the time of tender, read a paper stating as grounds therefor "because of the conditions in the papers now tendered, which are not in accordance with the terms stated on the sale; because of the mortgages now on the estate outstanding; and because the title is otherwise not satisfactory."

93 On the 9th day of June, 1871, the same property was again sold at auction to a M'r Milliken for the sum of $61,000, who subsequently accepted deeds therefor and entered into possession of the property.

The plaintiff gave evidence tending to prove that the estate of J. M. Thompson, at the time of his death, was insolvent, and proved that J. M. Weeks, of Lancaster, was appointed his administrator, and thereupon offered in evidence a general statute of the State of New Hampshire, as follows, Chap. 106, Revised Statutes of New Hampshire, section 3:

"In case of the death of any member of a copartnership, the surviving partner shall, within one month after, return to the probate office of the county in which administration on the estate of such deceased is granted, under oath, a true inventory of all the estate, together with a

94 correct schedule of all debts and demands due the copartnership.

"SEC. 4. The personal property returned in said inventory shall upon the application of the administrator or executor be appraised and a correct schedule of said debts and demands be made by three suitable persons, to be appointed by the judge of probate in the said county where administration is granted as aforesaid, and sworn before a justice of the peace to their fidelity and impartiality therein.

"SEC. 5. The surviving partner shall, at the time of returning such schedule, when requested by the administrator or executor of such deceased person, give a bond to the judge of probate with sufficient sureties in such sums as the judge shall order, conditioned to account and pay to the administrator of such deceased person such share of the partnership property as may of right belong to the estate of such deceased

after payment of the debts of the copartnership and the necessary
95 expense of adjusting the same.

"SEC. 6. If such bond is not given within sixty days after request by the administrator of the deceased partner, such administrator, on giving a like bond, shall cause such inventory to be made, and shall thereafter have entire control of the partnership property, and shall have the same authority in relation to it that he has as to the estate of the deceased, but he shall keep a distinct account of partnership affairs."

To the evidence of the statute so offered, the defendant, by his counsel, then and there objected as irrelevant and immaterial, which objection was overruled by the presiding judge, and the counsel for the defendant then and there duly excepted to such ruling and decision.

The plaintiff also gave evidence tending to prove that an inventory was made and an appraisement had in pursuance of the statute,
96 and that he remained in possession of the property of the partnership of J. M. Thompson & Co., and executed and delivered to J. M. Weeks, as administrator as aforesaid, a bond of which the following is a copy, and thereafter remained in possession of the property until it was finally sold.

Know all men by these presents that we, Stephen H. Cummings, of Green's grant, in county of Coos, and State of New Hampshire, and Nathan Cummings of Portland, in the county of Cumberland, State of Maine, and James F. Miller, of said Portland, and Jonathan Jewell, of Gorham, in said county of Coos, are held and stand firmly bound unto the judge of probate for the county of Coos, in the sum of one hundred and fifty thousand dollars to be paid to the said judge; to the true payment whereof we bind ourselves, our heirs, executors, and ad-
97 ministrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the 22d day of January, 1870.

The condition of the above obligation is such that whereas the said Stephen H. Cummings, who is surviving partner of Joseph M. Thompson, late of Green's grant, in said county of Coos, deceased, has, as such surviving partner, returned to the probate court in said county of Coos, under oath, an inventory of all the estate, together with a schedule of all debts and demands due the copartnership; and whereas the said Cummings has been requested by the administrator of said Joseph M. Thompson to give a bond to the judge of probate agreeably to the provisions of chapter 106 of the general statutes; now, if the said Cummings, surviving partner as aforesaid, shall account and pay to the administrator of said Joseph M. Thompson such share of the part-
98 nership property as may of right belong to the estate of said Thompson after the payment of the debts of the copartnership, and the necessary expenses of adjusting the same, then this obligation to be void, otherwise in full force and virtue.

STEPHEN H. CUMMINGS. [L. S.]
NATHAN CUMMINGS. [L. S.]
JAMES F. MILLER. [L. S.]
JONAH JEWELL.

Signed, sealed, and delivered in presence of—
Stephen H. Cummings to Augustus Cummings.
Charlotte A. Miller to George Goodridge.
[$1.00 stamp]

A true copy.—Attest:
[L. S]

J. M. WHIPPLE,
Register of Probate.

The plaintiff also gave evidence that he was present at the auction sale, and that on the day prior to the sale he met the defendant in the railway cars on the road from Portland to Gorham.

The plaintiff also testified that he conversed with defendant in the cars in reference to the sale; whereupon the plaintiff's counsel
99 asked him to state the conversation, to which question and evidence the counsel for the defendant then and there duly objected as irrelevant and incompetent on the ground that previous conversations could not effect or impair or modify the written agreement.

The counsel for the plaintiff then stated that he expected to prove by the witness the matter set forth in the following answer.

Thereupon, the court overruled the objection and admitted the question so asked and evidence so offered to be given, to which ruling and decision the counsel for the defendant then and there duly excepted.

The witness thereupon, in answer to the question, stated that the defendant asked him about the amount of mortgages upon the property, that the plaintiff told him as near as he could tell him at the time how much mortgage was held by the plaintiff's father, how much by
100 M'r Weston, of Salem, Massachusetts, and another mortgage of Thomas R. Jones, of Portland, amounting in all to about $51,000; that the defendant then asked him about the amount of the debts against the estate; that he told him as near as he could about the amount of the partnership and personal debts of J. M. Thompson; that he told him the encumberances were somewhere about $100,000, the whole amount of the partnership and personal debts as near as he could tell him then.

The plaintiff then further proved that the property was put up at auction at a maximum sum and run down instead of up; that it was knocked down on the defendant's bid of $90,000; that there was quite a number of persons present at the sale, to wit, about 25 or 30, several of whom were hotel men from about the mountains who had come
101 there prepared to buy the property.

That thereupon the paper heretofore inserted, signed by the defendant, was signed by him, it being posted on a printed advertisement of sale.

The plaintiff then proved that the signature endorsed on the paper, "A. R. Walker," was in the handwriting of M'r A. R. Walker, the auctioneer, but the plaintiff had no recollection of seeing him write it.

The plaintiff thereupon offered to read the said endorsement in evidence.

The counsel for the defendant objected to the reading of the endorsement upon the ground that it was not proven to have been done at the time of the sale, nor the time when it was written, and it had no connection with the transaction; and also that it was wholly irrelevant and immaterial, which objection the presiding judge overruled, and
102 permitted the said endorsement on said paper to be read in evidence, to which ruling and decision the defendant's counsel then and there duly excepted; and the plaintiff's counsel thereupon read the endorsement as follows: "A. R. Walker, auctioneer and agent for both parties."

The plaintiff then gave evidence tending to prove that at the time and place of sale the auctioneer declared other terms and conditions of the sale, and read the same from a slip of paper written by him upon an old Glenn House bill-head, and produced the said paper and offered to read the same in evidence.

The counsel for the defendant then and there duly objected to the

reading of the said paper in evidence, on the ground that the written contract also read in evidence specifies the terms and conditions of
103 sale; and also, that there was no connection shown on the face of the papers between the paper now offered to be read and the paper which was signed by the defendant, and it was irrelevant, immaterial, and incompetent.

The presiding judge overruled said objection, and permitted the said paper to be read in evidence, to which ruling and decision the counsel for the defendant then and there duly excepted; and the said paper was then and there read in evidence by the counsel for plaintiff as follows:

"There are mortgages on the property amounting to about $51,000. Any amount not already secured by mortgage after the payment of the twenty thousand dollars must be made secure to the satisfaction of the seller. The house to be kept open as heretofore."

The counsel for plaintiff then asked the witness the following question:

104 "Did the auctioneer declare any other terms and conditions of sale at the time and place of sale?

"A. He explained what was meant in regard to the condition of sale of the staging.

"Q. What did he say?"

The counsel for the defendant then and there duly objected to the statement of the auctioneer called for by the question propounded to the witness as incompetent, on the ground that the written agreement must control and could not be modified by parole statements not embraced in the writing subsequently signed, and the statement of the auctioneer was irrelevant, but the presiding judge overruled such objection and allowed the testimony, to which ruling and decision the counsel for the defendant then and there duly excepted.

Thereupon the witness answered, he explained what was meant
105 in regard to the condition of the sale of the staging; that the purchaser of the property had the privilege of buying the staging at an appraisal of three disinterested parties, or if he did not then the house had agreed or would agree to give the staging business of the house.

And the witness further testified that this staging business thus referred to was a regular route from Gorham Station, on the Grand Trunk Railroad, eight miles from the Glen House; that there was a regular line run in connection with every train to the house, and another line of stages run over to Conway, twenty miles distant, and a stage route to the top of Mount Washington.

The counsel for the plaintiff then asked the witness:

"Did the auctioneer say anything about these encumbrances or the right of the purchaser to take subject to the mortgages?"

106 To this question and testimony the counsel for defendant duly objected, on the ground that the written contract*ed* provided how the payments were to be made, and on the ground that the evidence was incompetent, but the presiding judge overruled the objection and allowed the question and testimony as to what was said by the auctioneer; to which ruling and decision the defendant's counsel duly excepted.

Thereupon the witness answered the question.

"Yes, sir. He said this could be arranged. He said they could be continued—could be arranged to continue, if the purchaser did not want to take them up immediately. That was the understanding as far as I can state it in his words. That is what he meant to convey.

"Q. (By plaintiff's counsel.) No; what did he say?

"A. That these mortgages could be continued.

107 "Q. If the purchaser did not want to take them up?

"A. Yes, sir."

The defendant then and there duly objected to the question, and renewed his objection to the testimony on the grounds stated in the objection to the preceding question, but the presiding judge overruled the objection and allowed the question and testimony, to which ruling and decision the counsel for the defendant then and there excepted, and thereupon the witness answered to the question, "Yes, sir."

The plaintiff then proved the publication of the advertisement of the sale in various newspapers several months before the sale; that the defendant was accompanied at the sale by M'r Woodbury Davis, a lawyer of Portland, and then asked the witness, being the plaintiff, the following question:

"Q. After this bid, and after defendant signed the memoran-

108 dum, did you send any message to the defendant?

The witness stated that he did, the next morning after the sale, from the Glen House, by his father.

The witness was then asked, "What was the message?"

To which question and testimony the counsel for the defendant then and there duly objected as irrelevant and incompetent, but the presiding judge overruled the same; to which ruling and decision the defendant then and there duly excepted.

"A. I sent word and requested my father to ask the defendant if the men I had to work there in the garden getting ready the vegetable garden of the house, and the other men about the place, whether I should let them go on with their work or whether we should stop until he took possession. I asked my father to take that message from the Glen

109 House to Gorham, to M'r Grafton. Judge Davis came up to the Glen House after that the same day; that was the day after the sale. I did not see him. He left a letter for me; that is it, and it is in Judge Davis' handwriting. (The letter shown witness was here marked for identification "Plaintiff's Exhibit G.")

The plaintiff further testified that he next met the defendant at M'r Minot's office in Boston in the forenoon of the 25th of May; that he went to the office accompanied by M'r Walker; met the defendant therein and presented to him the three deeds hereinbefore inserted and the bill of sale before referred to; that M'r Minot took partial copies of them and returned them to the plaintiff in defendant's presence, and that plaintiff then asked defendant when they would be ready to settle for the property, and that the defendant remarked the next

110 forenoon; that they met the next day, and the defendant stated to the plaintiff that M'r Minot had offered to act for him; that M'r Minot then took us into his back office, but M'r Grafton did not accompany us. After we got in there M'r Minot read from the slip of paper that he had in his hand that the defendant declined to take the property, and gave certain reasons (being those hereinbefore stated) as follows: Because the conditions read at the sale were not the same as those in the deed, because of the mortgages on the property, and because the title was not satisfactory; that the plaintiff then offered to make any alterations in the deeds if they were not satisfactory—if there was anything in the drawing of the deeds that was not satisfactory he would alter them; that M'r Minot thereupon said he did not want any

111 alterations, and asked him if he had any other papers to offer, and he said he had nothing except a bill of sale of the furniture

in his hands at the time, and that M'r Minot did not take the paper, and said he did not want it; that the deeds so tendered were those heretofore inserted; also bill of sale from Stephen H. Cummings to Joseph Grafton, consideration $21,000, marked "Plaintiff's Exhibit L."

The following is a copy of said bill of sale.

No. 7.—Pl'ff's Ex. L.

Joseph Grafton bought of Stephen Cummings this 16th day of May, 1871, for the sum of twenty-one thousand dollars, all the furniture of every description belonging to the Glen House, said furniture having been sold by me, the said Stephen H. Cummings, as surviving partner of the late Joseph M. Thompson.

(S'g'd) STEPHEN H. CUMMINGS.

Thereupon the plaintiff advertised the property again for sale
112 on the 9th of June, 1871, and offered to read in evidence a copy of a notice of the same, and which he gave evidence tending to prove that he had sent to the defendant by mail at the city of New York.

The counsel for the defendant then and there duly objected to the reading of the said paper in evidence, on the ground that it was immaterial and irrelevant, and that the subsequent sale was not competent evidence as against the defendant, which objection was overruled by the presiding judge; to which ruling and decision the defendant's counsel then and there duly excepted, and the counsel for the plaintiff thereupon read the said paper in evidence.

No. 8.—Pl'ff's Ex. M.

POSITIVE SALE OF THE GLEN HOUSE.—VALUABLE HOTEL PROPERTY AT AUCTION, SITUATED AT THE FOOT OF MOUNT WASHINGTON.

On Friday, June 9, 1871, at 12 o'clock noon, at the Alpine House
113 in Gorham, New Hampshire, on account of Joseph Grafton, will be sold the above hotel property, together with the furniture belonging to it, situated in Green's grant, in the State of New Hampshire, it being the same property sold at the Alpine House, in Gorham, N. H., on Tuesday, May 16th, 1871, at 11 o'clock a. m., by order of J. W. Weeks, administrator of the estate of the late J. M. Thompson, and Stephen H. Cummings, surviving partner of said Thompson, said Joseph Grafton having failed to comply with the terms and conditions of the sale.

The property will be sold on his account to the highest bidder, on Friday, June 9th, 1871, at the Alpine House, in Gorham, N. H., at 12 o'clock noon.

$5,000 will be required of the purchaser at the time and place of sale.

STEPHEN H. CUMMINGS,
Surviving Partner.
JAMES W. WEEKS,
Administrator of the Estate of J. M. Thompson.

114 The plaintiff also gave evidence tending to prove that the second sale was made at the same place where the first sale was made and by the same person acting as auctioneer, and that M'r Minot, the same gentleman before referred to, was present and objected to the sale, and forbade its taking place on account of M'r Grafton, and bid upon

the property, and that Charles R. Milliken also bid, and bought it; and then and there offered to read in evidence a paper purporting to be a memorandum of the sale and endorsement upon it, signed by the purchaser at the second sale.

The counsel for defendant then and there duly objected to the evidence so offered, and to the reading of the said paper in evidence, on the ground that the defendant was in nowise connected therewith, and no party
115 thereto, and the price for which the property then sold was not competent on the question of damages in this action, and was irrelevant, immaterial and incompetent, and not evidence as against the defendant, which objection the presiding judge then and there overruled and permitted the said paper to be read in evidence; to which ruling and decision the defendant's counsel then and there duly excepted.

The plaintiff thereupon read the said paper in evidence as follows:

No. 9.

GORHAM, N. H., *June* 9, 1871.

"We, the subscribers, do hereby acknowledge ourselves to be the purchasers of the estate known as the Glen House, in Green's grant, New Hampshire, and sold at auction on Friday, June 9th, 1871, with the furniture belonging to it, at 12 o'clock noon, and for the sum of sixty-one thousand dollars, said property being more particularly described in the advertisement hereunto affixed, and we hereby bind ourselves,
116 our heirs, and assigns, to comply with the following terms and conditions of the sale as declared by the auctioneer at the time and place of sale and at the sale, May 16th, 1871.

C. T. MILLIKEN.
S. H. CUMMINGS.

[5 c't stamp.]

Terms and conditions of sale.

Ten days will be allowed to examine the title, within which time the property must be settled for at the office of the auctioneer. Five thousand dollars will be required of the purchaser on the spot, which will be forfeited to the sellers if the terms and conditions are not complied with, but the forfeiture of said money does not release the purchaser from his obligation to take the property; fifteen thousand dollars must be paid on the delivery of the deed, and one-half of the balance of the purchase money to be paid Sept. 1, 1871; the remaining bal-
117 ance to be paid Sept. 1, 1872.

There are mortgages on the property amounting to about fifty-one thousand dollars, and any amount (not already secured by mortgages), after the payment of the twenty thousand dollars, must be made secure to the satisfaction of the sellers.

The property is sold subject to the conditions of the sale of the stage and mountain route, &c., which are that the proprietor of the routes shall have the exclusive stage and mountain business of the house, and that the house shall be kept open as heretofore.

On the back:

GORHAM, N. H., *June* 9, 1871.

We, the undersigned, assent to the within.

JAMES W. WEEKS,
Administrator.
STEPHEN H. CUMMINGS.

The counsel for the plaintiff then asked the witness the following question:

118 "Did you have any conversation with M'r Minot about that sale, or hear him make any statement in reference to it other than what you have said at this second sale?"

To which evidence and testimony so offered the defendant's counsel then and there duly objected, on the ground that M'r Minot did not appear to have been the agent of the defendant, and the presiding judge stated that he would admit the testimony, but that if it appeared thereafter that M'r Minot acted without authority of the defendant, it would be ruled out and the jury instructed in that regard; to which ruling and decision the defendant's counsel then and there duly excepted; and to the question so propounded the witness answered:

"M'r Walker, the auctioneer, in my presence, also asked him,
119 M'r Minot, a question in regard to what the property brought; if it brought more on that sale than at the first, who the difference belonged to, and he stated that it belonged to M'r Grafton. M'r Minot also said there that he objected to the sale, or forbade the sale. He said at the time the auctioneer was about commencing the sale, and outside in the presence of all."

The counsel for the plaintiff also asked the witness with reference to the second auction sale:

"Q. What did M'r Minot bid?"

To which testimony and evidence the defendant's counsel then and there duly objected on the ground that the same was irrelevant, immaterial, and incompetent; no connection between Minot and defendant as to the second sale having been shown, and there was no evidence of any authority to act as agent for defendant, or to represent him
120 at the said sale; which objection the presiding judge overruled, and allowed the question to be answered; to which ruling and decision the defendant's counsel then and there duly excepted. The witness thereupon answered:

"M'r Minot started it at 52,000. I think that was the first bid. And then there was a young gentleman that came up with M'r Minot who I understood was a clerk in M'r Minot's office. He made another bid and then M'r Minot again, and so on until it ran to something like $60,000. M'r Milliken bid, but not until after they got up to something over $55,000. The last bid M'r Minot made was $60,000, and M'r Milliken bid $61,000. It was knocked down to M'r Milliken. It was afterward conveyed to M'r Milliken, and he is the present proprietor."

The witness also testified: "The defendant did not buy the
121 staging property when he bid at the first sale. That was sold finally after the second sale to another party."

The counsel for the plaintiff then asked the witness the following question:

"Could the property be sold to as good an advantage on the 9th of June as on the 16th of May?"

To which question and testimony the defendant's counsel then and there duly objected, both as to the form of the question, and also as to the substance, on the ground this was not proper evidence on the subject of the measure of damages, and did not show or tend to show the actual value of the property at the time of the alleged breach by defendant; that the same was irrelevant, immaterial, and incompetent; which objection the presiding judge overruled, and admitted the question and evidence, to which ruling and decision the defendant's
122 counsel then and there duly excepted.

The question was not answered by the witness.

The plaintiff's counsel then asked:

"How long experience did you have in managing this hotel property?"

"A. I was there four seasons. Three seasons with M'r Thompson, and one season afterwards alone, and then two years after that I was conneeted with the house, helping run it.

"Q. Is there any difference in the market value of that property, the saleable value, depending on the time of sale?

"A. Yes, sir; it makes a decided difference. It was so late before the second sale could be effected that no one would give so much for it.

"Q. Why not?

"A. In the first place, any parties who had any idea of making any purchase of a summer hotel, had made all of their arrangements
123 by that time. It gave a man scarcely any time to get ready, a stranger going there. It was within two or three days of the time the house should be open.

"Q. Would the lateness of the season make any difference in getting custom for the season?

"A. Yes, sir; it did not give parties a chance to advertise the house and property that it would be opened, &c. Every year the house was always advertised three or four months beforehand."

The plaintiff also testified that he made a demand on M'r Grafton for the payment of what he claimed was lost by Grafton's failure to take title; that this was done through plaintiff's lawyer in Portland, M'r Putnam.

On his cross-examination the witness testified that he was very well acquainted with the Glen House property; that in one of the
124 advertisements it is stated that the premises contained about 1,000 acres; that besides the hotel building there was a saw-mill that had never been used except for business of the house; that there was a stable which would accommodate about 125 horses, a carriage-house that would accommodate some 4 or 5 stages and a dozen mountain wagons; that there was no other carriage-house or accommodation for carriages except that house.

In answer to the question "Livery business, any accommodation for that?" the witness testified: "There never has been any livery business outside of the stages;" and in answer to the further question, "I am asking you if there was any accommodation for livery business," testified: "Nothing outside of what I have described;" and the witness further testified that after the second sale he continued at the
125 hotel during the seasons of 1871, 1872, and 1873; that he went into partnership with M'r Milliken, the purchaser, on the second sale, immediately when the house was opened after that sale; that before the second sale he talked with M'r Milliken, and it was understood if M'r Milliken purchased the property, as he knew nothing about the hotel business, the plaintiff should stay and help run the house, and have a part of the property, on condition that he should make certain payments towards it as they went along; that the plaintiff was to have half the property under that arrangement if Milliken purchased it, and remain there and carry on the hotel if he could make the payments; that he had this talk with Milliken two or three days before the second sale in Portland; that the Millikens were wholesale grocers there; that the plaintiff could not remember whether he went to see Milliken
126 or Milliken came to see him about it; that they had no written agreement before the sale, but that after the sale Milliken gave

plaintiff an agreement which the plaintiff afterwards surrendered, having failed to make the payments, and the partnership between him and Milliken was dissolved; that the plaintiff's payments, according to the agreement, were to be completed within two years; that the agreement was drawn up by M'r Putnam, the plaintiff's lawyer, in Portland, right after the second sale, and in accordance with the agreement that had been made before the sale took place; that the plaintiff's one-third of the property was not turned in, but the plaintiff was to have one-half from Milliken on the payment of one-half of what Milliken paid; and that this was the resale of the property which the plaintiff had
127 referred to as on account of Captain Grafton.

That the plaintiff employed the person to act as auctioneer to make the second sale.

The plaintiff then proved that most of the premises consisted of wild lands, of very little value, except to hotel men, and then asked the witness to give an estimate of what was the market value.

To which question and testimony the defendant's counsel then and there duly objected, on the ground that it had not been shown that the witness was competent to speak of the value of land of that character, which objection the presiding judge overruled, to which ruling and decision the defendant's counsel then and there duly excepted.

The witness answered that this piece of about 800 acres or more, sold for about $10,000. It was more valuable as a hotel site than any-
128 thing else. I really don't know what land about there is worth. The land is worth about what the stumpage was worth. It depends upon how much timber there is upon it.

In reference to the arrangement between himself and Milliken, the witness further testified, that at first Milliken did not think favorab y of buying, but after consultation with his brother, he decided to go up, and if he could buy it for a certain amount which he had in his mind, to purchase; that the understanding was, as the witness said before, that if Milliken could buy, and that if witness would stay there and help him run it, the witness should have one-half the property conveyed to him, if he could make the payments as it was agreed on; that the witness thinks $75,000 was the sum mentioned up to which Milliken was to bid.

129 The witness did not tell Milliken that he would help him get the property at a low price, nor anything of the kind, and did not, in fact, give him any help to get it at a low price; that the witness did not talk with the auctioneer, or any person, about it at all; that nothing was done at the sale, so far as he knows, to keep the price down; that the witness made some payments towards purchasing the property, about $20,000, which was repaid to him when he finally failed to carry out the agreement, and decided to get out of the business altogether, which was about February, 1874; that so far as the witness knows, his arrangement with Milliken did not, in any way, influence the price of the second sale; that the witness made a payment at the time the bond was drawn after the sale; that M'r Milliken paid $5,000 down on the day of the sale; that the witness did not give any
130 of it back to Milliken when he, witness, came to make his payment, but that it went towards paying the debts of the concern of J. M. Thompson & Co.

The plaintiff called as a witness CHARLES SOULE, who testified that on the 24th day of May, 1874, he was a partner of A. R. Walker; that he was at the office of M'r Walker, the auctioneer, when a conversation

occurred between M'r Walker and the defendant, of which the witness at the time made certain minutes.

T e question was then asked of the witness by the plaintiff's counsel: "Did you know those minutes to be, at the time you made them, a correct statement of it or not?" and the witness answered, "Yes."

"Q. And you know now that it is?

"A. Yes, sir."

131 The counsel for the plaintiff then asked the witness to read the statement, to which testimony and evidence the defendant's counsel then and there duly objected, on the ground that the paper writing was not evidence against the defendant; that the same was irrelevant, immaterial and incompetent, which objection the presiding judge overruled, and allowed the witness to read from the paper, upon his declaration that he now knew the contents thereof to be true, and recollected that said conversation took place; to which ruling and decision the defendant's counsel then and there duly excepted.

No. 10.

BOSTON, *May 24th*, 1871, *Wednesday*.

Was present during a conversation at 48 Winter street, between Mess'rs Joseph Grafton and A. R. Walker, in reference to purchase of Glen House by M'r Grafton at auction, on the 16th instant. M'r Grafton stated that he had bid off the property at the suggestion of Judge

132 Davis, who told him that certain parties, creditors in Portland, whom he represented, would join him in the purchase for the mutual protection of M'r Grafton and themselves. M'r Grafton also said that he was much surprised on receiving a letter from Judge Davis, after his return to New York, stating that the parties referred to declined having anything to do with the property. He further stated that he would rather lose the amount of his claim than have $90,000 worth of property on his hands.

M'r Joseph Grafton, purchaser of Glen House, called. M'r Walker handed him the deeds of the property executed, upon which M'r Grafton remarked, that he wished to show them to his attorney. An appointment was then made for a meeting in half an hour at M'r Minot's office, Court street. M'r Walker to take deeds with him.

133 The witness upon cross-examination stated that independent of that paper he had very little recollection of what occurred in the conversation, and did not recollect what M'r Walker said; but also said, "That statement there brings to my mind that M'r Walker was in there, and had this conversation in a general way."

The plaintiff then called as a witness JAMES W. WEEKS, who testified that he was the administrator of the estate of J. M. Thompson; that the estate was insolvent, and he called upon the plaintiff to give the bond that had been read in evidence; that he agreed with the plaintiff in the winter of 1869 and 1870, that it should be run during the next season and sold in the spring of 1871, and he applied to the judge of probate for permission to sell the estate; and thereupon the

134 plaintiff read in evidence chapter 182, page 372, of the Laws of New Hampshire of the edition of 1867.

Counsel for the plaintiff also read in evidence plaintiff's Exhibits N, O, and P.

No. 11.—*Pl'ff's Ex. N.*

To the hon. judge of probate for the county of Coos:

Respectfully represents James W. Weeks, of Lancaster, in said county, administrator of the estate of Joseph M. Thompson, late of the Glen House, in Green's Grant, in said county, deceased, that the personal estate of said deceased is not sufficient to pay the demands against the same; that the said deceased at the time of his death was seized of certain real estate situated in said Green's Grant, described as follows, to wit, an undivided two thirds interest in the Glen House property, so called, containing about 800 acres, more or less; said property being subject to a mortgage to Nathaniel Weston, of Salem, Mass., and
135 to Tho's R. Jones, late of Portland, Maine, amounting to about $21,100.00 dollars. Said deceased was also in possession of one undivided half interest in Pinkham's grant, so called, containing about 2,800 acres; also a stable in Gorham, in said county, of which the deceased owned a two-thirds interest; also a pasture in the town of Jackson, in the county of Carroll, of about two hundred acres, of which the deceased possessed a two-thirds interest. All of which real estate except Pinkham's grant, is in the occupancy of S. H. Cummings, surviving partner of said deceased; that the detached property is not sufficient to pay said debts, and the said Glen House property may be more than sufficient to pay the same, but is so situated that it cannot be severed and sold without injury to the persons interested therein.

136 Wherefore he prays that he may have license to sell the whole of said real estate agreeably to the statute in such cases provided.

Dated the sixth day of March, A. D. 1871.

JAMES W. WEEKS,
Administrator.

A true copy of record. Attest:

J. M. WHIPPLE,
Register of Probate.

No. 12.—*Pl'ff's Ex. O.*

STATE OF NEW HAMPSHIRE,
Coos, ss:

At a court of probate holden at Lancaster, in said county, on the first Tuesday of March, A. D. 1871, upon the foregoing petition, it is ordered that a hearing be had thereon at a special probate court to be holden at Lancaster, in said county, on the first Tuesday of April next; and that the petitioner notify all persons concerned or interested therein to appear at said court and show cause, if any they have, why the prayer of said petition should not be granted, by causing said petition
137 and this order to be published three weeks successively in the Coos Republican, printed at Lancaster, the last publication whereof to be one week prior to said court.

B. F. WHIDDEN,
Judge of Probate.

A true copy of record. Attest:

J. M. WHIPPLE,
Register of Probate.

STATE OF NEW HAMPSHIRE,
Coos, ss:

At a special court of probate holden at Lancaster, in said county, on the fourth day of April, A. D. 1871, notice having been giv*ing* agreeably to the within citation, and no objection thereto being made, it is decreed that license be granted to the said James W. Weeks to sell at public auction all the right, title, and interest of the said Joseph M. Thompson, deceased, in accordance with the prayer of the petition.

B. F. WHIDDEN,
Judge of Probate.

138 A true copy of record.

J. M. WHIPPLE,
Register of Probate.

In witness whereof I have hereunto set my hand and seal of the court of probate of said county this 15th April, 1874.

[L. S.] JOHN M. WHIPPLE,
Register.

COOS, *ss:*

The judge of the probate of wills, &c., for said county, to all unto whom these presents shall come, greeting:

Know ye, that upon examination before us this fourth day of April, A. D. 1871, at a special court at Lancaster, in said county, it appears that the personal estate of Joseph M. Thompson, late of Green's grant in said county, deceased, in the hands of James W. Weeks, administrator thereof, is not sufficient to pay the debts and the demands
139 due from said estate. Wherefore license is hereby granted to the said James W. Weeks to sell at public auction an undivided two-thirds interest in the Glen House property, so called, containing about eight hundred acres, more or less; said property being subject to a mortgage to Nathaniel Weston, of Salem, Mass., and to Thomas R. Jones, late of Portland, Maine, amounting to about twenty-one thousand one hundred dollars. Also one undivided half interest in Pinkham's grant, so called, containing about twenty-eight hundred acres. Also a stable in Gorham, in said county, of which the deceased owns a two-thirds interest. Also a pasture in the town of Jackson, in the county of Carroll, of about two hundred acres, of which the deceased possessed a two-thirds interest. All of which real estate, except Pinkham's grant, is in the occupancy of S. H. Cummings, surviving
140 partner of said deceased. That the detached property is not sufficient to pay said debts, and the said Glen House property may be more than sufficient to pay the same, but it is so situated that it cannot be severed and sold without injury to the persons interested therein to pay and discharge the said debts and demands with incidental charges; and the said James W. Weeks, administrator, is hereby authorized to execute a valid conveyance of all the right and interest of the said deceased in and unto the said real estate at the time of his death to the purchaser; and the said James W. Weeks, adm., is directed to render an account of the money raised thereby, how it has been applied, as the law directs.

In testimony whereof I have hereunto set my hand and caused the seal of the court of probate for said county of Coos to be affixed,
141 the 4th day of April, anno Domini 1871.

B. F. WHIDDEN,
Judge of Probate.

To the judge of probate for the county of Coos:

The undersigned, widow of J. M. Thompson, late of Green's grant, deceased, assents to the granting of the petition of Ja's W. Weeks, administrator of the estate of said deceased, for a license to sell real estate, including the homestead and widow's dower, and will receive her share of the proceeds, to be estimated by said judge.

Dated at the Glen House, Green's grant, April 11, 1871.

CATHERINE M. THOMPSON.

Witness:

A. WHITNEY.

I, James W. Weeks, do solemnly swear that in disposing of such estate of Joseph M. Thompson, deceased, as I am licensed to sell, I will use my best judgment in fixing on and advertising the time and
142 place of sale, and will exert my utmost endeavors that the same shall be sold in such manner as will be of the greatest advantage to the persons interested in said estate, without any sinister or selfish views whatever, so help me God.

JAMES W. WEEKS.

APRIL 4TH, 1871.

COOS, *ss:*

Then personally appeared the above-named James W. Weeks and took the oath as prescribed by law.

Before me.

B. F. WHIDDEN,
Justice of the Peace.

To the hon. judge of probate for the county of Coos:

Having been duly sworn I gave the following notice:

Administrator's sale.

By virtue of a license from the judge of probate for the county of Coos, the subscriber will sell at public auction at the Alpine
143 House in Gorham, in said county, on Tuesday, May 16, 1871, at 11 o'clock a. m., all the right, title, and interest belonging to the estate of J. M. Thompson, late of the Glen House, Green's grant, in certain real estate, consisting of the Glen House, a mill, and about 800 acres of land on which the same stands in said grant; also a stable in said Gorham known as the Glen House stable, with the land on which the same stands.

Conditions made known at time and place of sale.

JAMES W. WEEKS,
Administrator.

Dated May 5th, 1871.

On Monday, the 8th day of May, 1871, I posted a copy of the above notice at the Glen House, Green's grant, at the Gorham House, Androscoggin House, and Alpine House, Gorham, three public places in said town; the three last of said notices remained posted at the time
144 of sale. I also posted similar copies at the Lancaster House, Lancaster; Wammbee House, Jefferson; at Truckey's hotel, Jackson, and forwarded large numbers of copies to prominent persons and places.

The following notice was also posted by direction of M'r S. H. Cummings, surviving partner of the said J. M. Thompson, deceased, and by the sanction of M'r's Catherine W. Thompson, widow of deceased, at the said Glen House, and the above-named places in Gorham, either on said eighth day of May, or prior thereto, the copy at the Alpine House remaining posted at the time of sale, to wit:

Glen House at auction.

The famous summer resort at the foot of Mount Washington, known as the Glen House, together with the land, furniture, mill, and out-
buildings, will be sold at public auction at the Alpine House,
145 Gorham, N. H., Tuesday, May 16th, 1871, at 11 o'clock a. m.

The following notice was published in all the numbers (intervening between the date thereof and time of sale) of the Boston Post and Journal, the Portland Argus and Press, the N. H. State'man and Monitor, the N. H. Tribune, and various other papers of the country:

Valuable hotel property for sale.

The favorate summer resort known as the Glen House, situated at the foot of Mount Washington and at the commencement of the carriage road to the summit, will be offered for sale, together with the land, containing about one thousand acres (well timbered), all the out-buildings, stables, and mill at the same. Also the furniture, staging, mountain-carriages, horses, &c.

The house contains some two hundred and twenty-five rooms, capable of accommodating between four and five hundred guests. The
146 whole property, if not disposed of at private sale previous to the first of May will be sold at public auction, to close the estate of the late J. M. Thompson. Notice of the time and place of sale will be hereafter given.

Any person desirous of seeing the property, which is in thorough repair, or wishing to make any enquiries, can do so by applying to J. W. Weeks, administrator, at Lancaster, N. H., or to S. H. Cummings, Falmouth Hotel, Portland, Maine.

PORTLAND, March 13th, 1871.

At the time and place above advertised I met M'r S. H. Cummings, the surviving partner of the deceased, who had employed M'r R. A. Walker, an auctioneer of Boston, to make said sale.

The whole of said property above described, as well as the furniture, &c., of the Glen House belonged to the firm of J. M. Thompson
147 & Co., and it was thought by S. H. Cummings, surviving partner of said Thompson, and his administrator, that the property would bring a higher price to sell the whole together. Consequently all the interests were combined, and the whole of the Glen House property in Green's grant was sold by the auctioneer including furniture, at time and place above advertised. Joseph Grafton, of N. York City, being the highest bidder for the same, it was struck off to him for the sum of ninety thousand dollars. At the same time and place, in accordance with the foregoing notices, in conjunction with the said surviving partner of said Thompson, I sold at public auction the stable and the land on which the same stands to John Lindsey for the sum of five hundred and eighty dollars, he being the highest bidder for the

same; and I have executed a deed for said Thompson's interest in said real estate, dated May 17, 1871.

Said Joseph Grafton failing to comply with the terms of said sale, and declining to accept his deeds, the property sold him was again advertised by me by giving the following notice:

Administrator's sale.

By virtue of a license from the judge of probate for the county of Coos, the subscriber will sell at public auction, at the Alpine House, in Gorham, in said county, on Friday, June 9, 1871, at twelve o'clock noon, all the right, title, and interest belonging to the estate of J. M. Thompson, late of the Glen House, Green's grant, in certain real estate, consisting of the Glen House, a mill, and about 800 acres of land on which the same stands in said grant; said property being the same as purchased by Joseph Grafton, May 16th, 1871, at administrator's sale, who failed to comply with the terms of said sale. Conditions made known at time and place of sale.

JAMES W. WEEKS,
Administrator.

Dated May 29, 1871.

On June 1, 1871, I caused to be posted copies of the foregoing at the Glen House, Gorham House, and said Alpine House, the two last being public houses in said Gorham, which notices remained posted at the time of sale advertised. I also caused a copy of said notice to be published in the Coos Republican, a paper printed in said county, of the issue of said June 1, 1871. I also forwarded similar notices by mail to Joseph Grafton, esq., N. Y.; Eagle Hotel, Concord; White River Junction House; Twin M't House; Albert Merrill, esq.; Conway, Davis & Drummund, Portland, and to many other prominent places and persons. The following notice was published in the above-named paper of said June 1, 1871:

POSITIVE SALE OF GLEN HOUSE.—VALUABLE HOTEL PROPERTY AT AUCTION, SITUATED AT THE FOOT OF M'T WASHINGTON.

By R. A. Walker & Co., auctioneers and real estate agents. Office, No. 48 Winter street, Boston.

On Friday, June 9, 1871, at 12 o'clock noon, at the Alpine House, Gorham, New Hampshire, on account of Joseph Grafton, will be sold the above hotel property, together with the furniture belonging to it, situated in Green's grant, in the State of New Hampshire, it being the same property sold at the Alpine House, in Gorham, N. H., on Tuesday, May 16th, 1871, at 11 a. m., by James W. Weeks, administrator of the estate of the late J. M. Thompson, and Stephen H. Cummings, surviving parner of said Thompson, said Joseph Grafton having failed to comply with the conditions of said sale.

The property will be sold on his account to the highest bidder, on Friday, June 9th, 1871, at the Alpine House, in Gorham, N. H., at 12 o'clock noon. $5,000 will be required of the purchaser at the time and place of sale.

STEPHEN H. CUMMINGS,
Surviving Partner.

JAMES W. WEEKS,
Administrator of Estate of J. M. Thompson.

May 29, 1871.

Handbills of the same purport as the above were posted at the hotels in Gorham, which remained posted at the time appointed for sale. Similar handbills were circulated throughout the country. On the said 9th day of said June, 1871, at 12 o'clock noon, at the said Alpine House, the time and place advertised for said sale, I met the said S. H. Cummings and the said R. A. Walker, auctioneer, who again sold at
152 public auction the property bid off by said Grafton to W. F. and C. R. Milliken for the sum of sixty-one thousand dollars, they being the highest bidders for the same. Said sum of sixty-one thousand dollars not being sufficient to meet company liabilities and mortgages on said real estate and personal property, and the estate not realizing anything from the sale over the incumbrances, I executed a deed to said Millikens, with nominal consideration.

Dated June 17, 1871.

JAMES W. WEEKS,
Administrator.

MARCH 21, 1872.

Then the said J. W. Weeks made oath that the foregoing return and certificate by him signed is true.

Before me.

B. F. WHIDDEN,
Justice of the Peace.

153 Received this 21st day of March, 1872, and approved as sufficient.

B. F. WHIDDEN,
Judge of Probate.

A true copy of record.—Attest:

J. M. WHIPPLE, *Register.*

In witness whereof I have hereunto set my hand and the seal of the court of probate of said county this 15th April, 1874.

JOHN M. WHIPPLE, *Register.*

The witness testified that there was an agreement that the property should be sold at a particular time; that was on the 16th of May, 1871, and the plaintiff was to sell it with the sanction of witness.

Witness further testified: In a conversation between himself and the defendant (the defendant being accompanied by Judge Davis, as his counsel, before the sale) witness told him that the amount of the mortgages upon the property was about $51,000.

154 The witness was then asked the following question: "Was anything more said about the incumbrances and the $51,000 of mortgages than what you have stated?"

(The defendant's counsel duly objected to this testimony, on the ground that the previous statements were merged in the written agreement signed by defendant, and the conversation asked for was irrelevant, immaterial, and incompetent; which objection was overruled by the presiding judge; to which ruling and decision the defendant's counsel then and there duly excepted.)

The witness answered: "Not before the sale, I think. I would say that I think I stated the arrangement of the mortgages, a part of them —about $28,000—stood against J. M. Thompson & Co. to Nathan Cummings, and the balance against J. M. Thompson, and about
155 $16,000, more or less, of J. M. Thompson's debts were insecured.

The witness testified that he was present at the sale, and was near the auctioneer at the time of sale; that the auctioneer remarked that it was time to commence the sale, stepped to a desk, wrote on a piece of paper, and I think he wrote on two, and hurriedly said, "Well, I can remember," or something like that, and very shortly went out and began by stating the terms of sale; that they would be $5,000 paid down, which would be forfeited; that there would be $15,000 paid on the delivery of the deeds, and that the five thousand dollars would not exonerate the bidder from taking the property; and that then he stated the amount of the mortgages as follows: "There are mortgages to the amount of about $51,000, the exact amount will be ascertained";
156 that he then laid down his paper and commenced; that he made use of that expression, "The exact amount would be ascertained"; that he then spoke of the stage property having the exclusive benefit of the house, the owners of the house having the right to take the property when it was not run to their satisfaction; and that he said more, but the witness could not state what.

On being shown Exhibits E and F (heretofore inserted) the witness testified that he was unable to state whether those were the papers the auctioneer read from or not; that he saw Exhibit E after the sale the same day, and a moment after the defendant had signed it; that the other paper that he wrote on was a loose paper, whether written on with pencil or ink he could not say; that Exhibit F was the other paper that he wrote on, and that the property was then bid off by the de-
157 fendant; that after the sale Judge Davis remarked to witness, in presence of the defendant, that it was important for the defendant that he have the control of those mortgages; and after some little talk about it Judge Davis remarked there could be no trouble about that; that he should have control of those mortgages that he might better arrange his payments. That then they spoke about the $5,000 bid money, and it was remarked that the estate was owing Capt. Grafton $5,000; that it did not want any money, but that he should simply give a memorandum to apply on that, and that Capt. Grafton gave the memorandum in Exhibit Q, which was then read in evidence by plaintiff.

No. 14.—Pl'ff's Ex. Q.

MAY 16, 1871.

There is due James W. Weeks administrator of the estate of Jo-
158 seph M. Thompson, five thousand dollars, as the advance payment upon the Glen House property this day purchased by me.

(S'd) JOSEPH GRAFTON.

That it was then also agreed with regard to the deeds what the deeds should be, and that M'r Heywood should make them; and it was also agreed that there should be a deed from M'r's Thompson and M'r Cummings and the administrator's deed. It was to be a quitclaim deed from M'r's Thompson; that after the first sale fell through the witness made efforts to have a resale, or to get purchasers at the second sale—to get bidders at the second sale; that he put a notice in the papers, in connection with M'r Cummings, that the property would be sold, and as the property of Capt. Grafton, and that he also advertised, as administrator, that the property would be sold at a certain time,
159 and sent notices to hotel proprietors and to defendant by mail; that the witness was present at the second sale and saw M'r Minot and a young man by the name of Jackson there, and had some con-

versation. Just before the sale he, Minot, suggested to Walker to make the terms of sale precisely the same as they were at the first sale, which, I think, he did. I so understood it, according to my recollection. M'r Minot, when the matter was called up, forbid the sale in a loud voice, so as to be heard by those present, and stated in the first sale it was not stated that the house was to be kept open as theretofore: that that was a new clause, and was not contained in the declaration of the auctioneer at the first sale.

160 The counsel for the defendant, as to the evidence of the declarations and statements made by M'r Minot at the sale, in due time duly objected, on the ground that there was no evidence that M'r Minot was the agent for defendant at the said sale, or had any authority to represent him or act for him thereat, and the same were irrelevant, immaterial, and incompetent; which objection was overruled by the presiding judge, who said that he would give proper instructions thereafter with reference to said testimony, and the evidence allowed; to which ruling and decision the defendant, by his counsel, then and there duly excepted.

The counsel for the plaintiff, among other questions as to the statement of Minot, asked the witness the following question: "What did M'r Minot say to you in reference to his acting for Capt. Grafton?"

161 To which question and evidence the defendant's counsel then and there duly objected, on the ground that M'r Minot's statements were not competent to prove any agency for or authority to represent or to bind defendant, and were irrelevant, immaterial, and incompetent; which objection the presiding judge overruled; where upon the defendant's counsel duly excepted to his ruling and decision.

(This question was not admitted for the purpose of establishing the agency of Minot by his declarations.)

The witness answered: "He said that the objection M'r Grafton had to taking the property was that the horse property had the exclusive benefit of the house, and that that was an incumberance on the property. I remarked to him that he could have had the property, and the owner of the Glen House could have the property at any time under the arrangement, at the appraisal of three disinterested men."

162 "Q. That is, the stage property; the horse property?

"A. Yes, sir; that was the arrangement under which Lindsey made his bid for it.

"Q. Who made the sale of the horse property?

"A. M'r Cummings made it, but with my approval and acquiescence. I interested myself in getting the bid for it."

The witness further testified that he did all that he could to make the second sale a fair sale and get a good price for the property; that several made bids at the second sale, among them M'r Jackson, M'r Minot, and M'r Milliken.

On cross-examination the witness stated that he read Exhibit E after it had been signed by the defendant, but that he did not read the other paper referred to by him, and that he was unable to state whether

163 Exhibit F was or was not the paper, but it was such a paper.

The plaintiff then called as a witness HENRY HEYWOOD, who testified that he is a practicing attorney for fourteen years; that he was present at the sale, and saw the defendant with Woodbury Davis after the sale; that the auctioneer wrote the terms of sale on the margin of the paper subsequently signed by the defendant, and also on an additional paper, to wit, Ex. F. No. 6, and the witness saw the auctioneer write it.

The attention of the witness was called to a conversation with the defendant, M'r Weeks, and Judge Davis after the sale.

Witness said: "After he (Grafton) signed the second memorandum I requested him and M'r Weeks to go into one of the reception
164 rooms, and I had a talk with Judge Davis in his presence as to preparing the deeds."

"Question. State what was said."

(Testimony objected to by defendant upon the same ground previously stated as to similar testimony.)

"Answer. Prior to the auction-sale there had been a good deal of talk in the presence of M'r Grafton, and with him, between M'r Grafton and M'r Weeks and myself, as to the amount of mortgages on the property, and the amount was known except one mortgage, the one that was then held by the Casco Bank of Portland. That was ascertained from the older M'r Cummings, who was present, and the amount of mortgages was determined to be about $51,000. There was some talk whether the property should be sold subject to the mortgages or not.

"Question. State what that conversation was."

165 (Defendant also objects to admission of this testimony, upon the ground that it does not form any part of the contract. The witness having already occupied considerable time in detailing the conversation, and having gone over the conversation substantially, the court directed him to state the result of the discussion about the mortgages, and also whether, in pursuance of that result, it was embodied in the paper Exhibit F. No. 6; to which ruling the defendant's counsel then and there duly excepted.)

The witness thereupon answered: "The result of it was that the property was to be put up, and the bidder could take it as he chose, subject to the mortgages, or pay the full amount of the bid, and the surviving partner pay off the mortgages; and that then, after the bidding, M'r Weeks, the administrator, and the witness and the defendant
166 and Judge Davis being present, the witness asked the defendant and Judge Davis which way they would have the deeds made, and that Judge Davis said that he could control all the mortgages upon the property, and it would give the defendant more time to make his payments to take the property subject to the mortgages; and that witness asked him if an administrator's deed from M'r Weeks and a quitclaim deed from the widow of J. M. Thompson and a deed from the plaintiff and his wife would be satisfactory, and he said it would be so; that witness asked them if he should make such deeds and have them executed, and they replied that he should, and that he did make them and had them executed, ready to be delivered, and that these were the deeds that were tendered, as witness understands."

167 Deeds of said property from S. H. Cummings and wife, Weeks, administrator, from heirs of J. M. Thompson, all for the nominal consideration of $1.00, and from Catherine M. Thompson, to the Millikens, were put in evidence.

Testimony of the conversations of various witnesses with defendant prior to the sale in regard to the mortgages on the property was not offered or admitted for the purpose of altering, varying, or adding to the written terms of sale, or for the purpose of showing what the terms of sale were, but for the purpose of showing that the alleged reason of the defendant for refusing to accept the deeds were a fictitious reason, and that his assertion that he did not know about the mortgages was untrue.

The plaintiff offered other testimony tending to show that the de-

168 fendant's theory of his reasons for refusal was incorrect, and that he was really attempting to avoid a contract of which he had become weary.

The deposition of ASA F. BARRON, a witness for the plaintiff, was read, who testified in substance that he was a hotel-keeper, familiar for several years with the Glen House; that he went to the first sale, intending to buy the property at a price not to exceed $75,000; that he was present at the auction-sale; that the auctioneer stated that there was somewhere a little over $50,000 of mortgages upon the property, and that it was stated there, by whom he did not know, that the purchaser might make any arrangements he could with persons holding the mortgages.

169 The deponent was then asked to state what, if anything, was said about the house being kept open; to which question and evidence the defendant's counsel duly objected, on the ground that it did not appear by whom it was said or to whom, and that it could not control, affect, or impair the terms of sale, as subscribed by the defendant, and as irrelevant and immaterial; which objection, it appearing that said statement was one of the terms of sale as publicly announced by the auctioneer, the presiding judge overruled, and the defendant's counsel then and there duly excepted, to which question the deponent stated:

"That was one of the terms of the sale, that the house should be kept open as usual, because John Lindsley had bought, or had the refusal of the staging of the house. This was said by the auctioneer when

170 it was sold. It was stated by the auctioneer at the time of the sale that the purchaser of the real estate had the right to take the staging at the appraisal of men if it was not run to the satisfaction of the purchaser of the house."

The deponent was then asked, "What effect, if any, would the later period in the season of the year at which the second sale occurred have upon the value of real estate and furniture?"

(To which testimony the defendant's counsel duly objected as irrelevant, immaterial, and incompetent, and not limited to the time of the alleged breach of the agreement by defendant; which objection the presiding judge overruled and allowed the question; to which ruling and decision the defendant's counsel then and there duly excepted.)

The witness deposed: "It would have a considerable effect,

171 because the house ought to be cleaned up and put in order so as to have the house open by the middle of June; that he could not tell the difference in dollars and cents; that the value would be diminished by the sale being later."

On cross-examination the witness stated that the stage property, with its privileges connected with the house, was a valuable property, and that he should prefer, if purchasing the Glen House real estate and furniture, to have with it the ownership of the stage property and the stage business under his control; that the real estate and furniture would be worth less with the ownership of the stage property and business under the control and management of any other; that he could not tell what the difference would be.

A witness for the plaintiff, named CORDONIA MERRILL, de-

172 posed by deposition that he is the manager of the Crawford House, in the White Mountains, for the firm of A. T. and O. F. Barron; that he was present at the first auction sale.

He was asked to state whether or not the incumberances or mortgages existing upon the property were mentioned in any way by the auctioneer.

(To which question and testimony the counsel for the defendant duly objected on the ground that the written contract subscribed by the defendant must control as to the terms of the sale and could not be varied by the testimony offered, and that the same was irrelevant, immaterial, and incompetent. The presiding judge overruled the objection, and the defendant's counsel then and there duly excepted.)

The witness deposed that he thinks the amount was stated, and that it was stated it would be about $50,000; that he could not say
173 whether anything was stated by the auctioneer about the house being kept open; but he thinks that the right was reserved to the purchaser of the real estate to take the staging property when it was not run to suit the proprietor of the house; that this declaration was made by the auctioneer at the time the property was put up for sale.

The witness was asked, "What effect, if any, would the later period of said second sale have upon the value of other real estate and furniture?"

This was objected to by defendant's counsel as calling for an opinion of the witness without showing an acquaintance with the property and circumstances, and that the witness was not present at the second sale, and was not limited to the time of the alleged breach by defendant.

The presiding judge overruled the objection, to which ruling and
174 decision the defendant's counsel then and there duly excepted.

The witness answered: "I should think it would decrease the value of the property by increasing the expense of opening, and general uncertainty about running the house." Also that he made an inspection of the house the day of the sale.

On cross-examination the witness stated that when he heard the proclamation made by the auctioneer at the opening of the sale he could not state whether it was in writing or printed; that he did not know whether the auctioneer had any paper from which he stated the conditions of the sale; that he knew he had a large hand-bill or poster that contained a description of the property; but as to the conditions of sale he did not see them, only he had supposed that he had a paper,
175 for the conditions appeared to be at his tongue's end as he gave them off.

The plaintiff then called as a witness JAMES W. WEEKS, and asked him the following question: "Do you know what the auctioneer Walker charged as commissions for services in selling the property?"

To this question and testimony the defendant's counsel duly objected as irrelevant, immaterial, and incompetent, and the charges made by the auctioneer were not competent to be considered by the jury as an element of damages. The presiding judge overruled the objection, and the defendant's counsel then and there duly excepted to such ruling and decision.

A. "He charged one per cent."

Q. "That is what was paid for his services?"

A. "That is what we allowed M'r Cummings for paying him, being $610 on the second sale and $900 on the first sale."

176 On cross-examination he stated that he did not see any of this money paid to the auctioneer; that all he knew about it was that in a settlement between plaintiff and himself he allowed him so much as paid for the commissions.

The plaintiff's counsel then asked the witness: "Did you pay your share of the expense?" To which question the witness answered: "It was allowed in the settlement with the estate."

The counsel for the defendant then moved to strike out this evidence of M'r Weeks as to the amount of commissions charged, upon the ground that the witness had no knowledge as to the sum paid to the auctioneer, and that the mere fact that he allowed it in the settlement of accounts between himself and plaintiff was no evidence of pay-
177 ment on which defendant could be charged, and the evidence was irrelevant, immaterial, and incompetent; which motion was denied by the presiding judge. To which refusal the defendant's counsel then and there duly excepted.

The plaintiff's counsel then rested his case.

Thereupon the defendant, being called in his own behalf, testified: That he was a creditor of J. M. Thompson for money loaned, at the time of his death, to the amount of $10,000; that learning of the proposed sale of the Glen House property, he went to the place of sale, met the plaintiff on the cars; had no conversation with him except to bow to him and give him the time of day, but heard the conversation between M'r Cummings and M'r Davis. That on the 16th of May he had a conversation with the plaintiff, and asked him if the horses and
178 carriages were sold; that he answered that the sale was not completed, and there was no sale yet; that that was the only conversation he had had with the plaintiff; that he did not see the plaintiff in conversation with M'r Weeks, the administrator; that there was conversation in the reception-room, at which were present M'r Heywood and Judge Davis, who had the defendant's claim for collection, and that M'r Cummings may have been there, and they began to discuss the question about their right of selling; that M'r Davis stated that M'r Weeks thought he ought to have the right of redemption, and that the question was discussed, and there may have been something said about mortgages, but nothing was said to the witness; that he paid no attention to that part of it, took no part in the negotiations and dis-
179 cussions as to how matters were to be arranged, and was merely waiting to hear what the terms of the sale would be. That M'r Walker, the auctioneer, came out on the piazza, the defendant standing about six or eight feet from him. That M'r Walker read off an advertisement, and had another paper in his hand, and Exhibit F looks like it; the defendant heard him read the terms and conditions of sale. That when the auctioneer first offered the property, he said "I put this valuable property up," and he read off the terms, which were to this effect: Five thousand dollars to be paid on that day; fifteen thousand dollars to be paid in ten days, when the deeds were to be delivered; and the balance one-half, to be paid the first of September, 1871, and the remainder on the first of September, 1872; that this property
180 was sold subject to the condition of the sale of the horses and carriages; that they should have the exclusive staging of the house.

Q. Were there any other terms or conditions of sale read or announced by the auctioneer in your hearing at that sale?

A. No, sir; not a word.

Q. Did you see any paper like this, or hear anything like it, to wit: "There are mortgages on the property amounting to about $50,000; any amount not already secured by mortgages after the payment of $20,000 must be made secure to the satisfaction of the seller; the house to be

kept open as heretofore." Was anything like that said in your hearing at that auction sale?

A. No, sir; nothing of the kind said.

Q. Was that paper present when you made your signature to Exhibit E?

181 A. That (Exhibit E) was the only paper I signed.

Q. Do you know of any other terms or conditions of sale than those contained in Exhibit E, No. 1?

A. No, sir; there were no others. I did not give the auctioneer any authority whatever to sign any paper for me. I did not give him any instructions. After the lapse of about an hour from the first announcement, the auctioneer came forward again and said, "I am going to offer this valuable property again"; but he said nothing further when he put it up or said anything further. I then bid the $90,000. There were no other bidders and it was knocked down to me. After the sale I signed Exhibit E, No. 1, and I signed a due bill for $5,000. M'r Davis was to examine into the title. He had been with me advising me. He

182 said we must be very careful.

The witness had arranged to be in Boston on Wednesday the 24th day of May, to pay the whole amount in cash, and called at M'r Walker's (the auctioneer's) office, and asked him when M'r Weeks would come down to deliver the deeds. He said he thought that M'r Cummings would come with the deeds. He said, "I thought when you were bidding for that property that you were bidding for the other creditors." Said I, "That is a suggestion I suppose you got from Judge Davis, because he represented five other creditors, and he spoke to me and wanted to know if I would allow them, if they wished, to join in the purchase." He said to me, "Well, you have got a very cheap piece of property. If I had nothing else to do, I should like to take it off

183 your hands, and to go up there and make $40,000 before you make your second payment. You've got a very easy payment to make. They owe you $10,000. You pay $10,000 down and you have $35,000 to pay September 1st, 1871, and you have got the whole season to do it, and the next September 1, 1872." Then he said, "M'r Cummings feels very sore about this thing. He wants to keep the property, and I am very sorry for M'r's Thompson, too." Says I, "I am, too; and I would rather lose $10,000 than to distress M'r's Thompson or their family." In relation to M'r's Thompson, I did not want to take their property if they could carry it on.

Q. That was the manner in which the sum of $10,000 was referred to?

A. Yes; that was the subject of our conversation. He said another thing. He said, "Why don't you buy the horses and carriages?

184 The horses and carriages are not sold." I said "M'r Lindsey, I knew very well, was going to see me after they gave me a good deed, and I would see him when I got the deed." So that ended the conversation. The next day M'r Cummings came with M'r Walker to the Tudor Company's office. My brother-in-law is the head of the Tudor Company. M'r Minot is president of the Tudor Company. M'r Walker said he would come there. I told him where I was. They came in the morning of the 26th, I think. I was in the room. I read over the deeds. I said to M'r Cummings, "The contract and terms of sale call for an unencumbered deed. There is an incumberance on this property, mortgages which I do not know anything about; they may be overdue and the interest unknown. You must make that good, amend that, and

185 pay off your encumbrances." I said I objected to another thing.

I said "The horses and carriages are not sold; specify the conditions on which you are going to sell the horses and carriages, and leave out what is not in the terms of sale. You have got in there the mountain road, which is a toll-road, on which they pay a dollar a passenger, and you claim on that deed that the house should give you the exclusive right over this mountain road. You have put also in here livery business, stable business, of the house. This livery business and stable business is a perpetual mortgage, a mortgage forever on those stables belonging to the house, whether it was a hotel, or whether it was a poor-house, or what." I told him, however, I should submit this to my
186 attorney, M'r Paine, and I came in the next morning. M'r Minot came in after I had this conversation. He took a memorandum of the deeds to go and show them to my attorney, M'r Paine. In the mean time I consulted counsel. The next day, on which the deeds were to be delivered, I think the 26th, they came in. I came in just after they did. M'r Minot handed them an answer dictated by the attorney. He read it to them and asked them to take a copy of it.

Counsel reads the paper, as follows: "M'r Grafton declines to accept the paper tendered, because of the conditions inserted in the paper now tendered, which are not in accordance with the terms stated at the sale, because of the mortgages on the estate outstanding, and because the title is not otherwise satisfactory."

187 That is the last I saw of plaintiff and M'r Walker. They declined to amend anything or change anything.

Plaintiff spoke up and said that those were the deeds that were drawn up by the attorney, and that was all he had to offer to us to accept.

The witness said he never received any notice of any other sale.

Some time after this, M'r Minot sent me an advertisement cut out of a paper. I saw it stated that the property was to be sold for my account. I did not instruct or say anything to M'r Minot about going up to the sale. He went on his own account. He was not my agent. I had nothing to do with him in the matter.

The witness then testified as to the value of the Glen House real estate, to the effect that the site was worth 30,000; that the building could not be put for less than 50,000; this was besides the personal
188 property belonging to it; that the plaintiff had informed Judge Davis, in witness' presence, on the cars going to Gorham, that the appraisal put on the property after the death of M'r Thompson, by three persons appointed for that purpose under an order of the court, was over $160,000 for the personal and real property; $169,000 or $170,000 for all the property. And the witness further stated that, including the furniture and the land, and according to the terms and conditions of sale by which it was offered at the first sale, he considered the property cheap at $100,000.

That there were very few visitors at the Glen House usually until after the first of July; that he made up his mind how he would act in bidding at the first sale, after he had heard the conditions and
189 terms of sale, and they had put it up for $90,000; that he then made up his mind that he would buy it. That the conversation with M'r Cummings as to whether the horses and carriages had been sold was before the sale, on the 16th of May, and M'r Cummings said, "I am in treaty with M'r Lindsey and my brother-in-law, M'r Thompson."

In the conversation which originated on the day of the sale and before the sale with M'r Weeks, Judge Davis, and the plaintiff, Judge Davis asked M'r Weeks about the mortgages, after he asked about the right

to sell according to the laws of New Hampshire; that they talked of the right of redemption in a general way, and Judge Davis asked M'r Weeks what incumberances were on the property. They spoke informally of a
note to Tho's R. Jones, of Lancaster, which I think Judge Davis
190 explained, and then of another mortgage, in a desultory way,
which I did not pay much attention to. It was immaterial to me. They had not offered the property for sale. I did not know that the property was mortgaged until after the sale of the property, after I bid $90,000. Before the property was put up a second time on the first sale I had made up my mind to bid about $90,000, if they put it up under the terms and conditions which they read. When I left the next day, Judge Davis remained to look into the law point of the case with reference to the right of redemption, and to examine other points of law to see if the administrator had conformed with the laws of New Hampshire. I talked with Judge Davis about the other creditors coming in
and joining him. He proposed that. He asked, as he had been
191 authorized to bid $90,000 for the other creditors, if I would allow
them to join in the purchase. I would not have had any objections to that if they wished to make it a company. I never heard a word in reference to M'r's Thompson being let into the purchase before I left. Between the sale and the day I went to M'r Walker's office I was making arrangements to pay the money. I used to see M'r Minot every day. He was my brother-in-law. The copies of the deeds were taken to M'r Payne, and he gave an answer to M'r Minot. I was not very well that day, and M'r Minot said he would go and see M'r Payne and get his answer. I received from M'r Minot the advertisement that the property was to be sold for my account a short time before the day
fixed for the sale, but paid no attention to it, except to write to
192 M'r Jackson, at Boston, to the effect that he had better go up and
see what they were doing with the property; that I did not think they dared to put up the property on my account, and I wrote to him that I did not think they would give a deed to any one but M'r Cummings and his party, and I wrote to him that if they put up that property on the terms and conditions specified in the deed tendered to me it would depreciate the value of that property thirty per cent. I told him to go up there and watch and see what they were going to do. That if they dared to put up the property on the terms and conditions mentioned in my deed it would depreciate the value of the property over $30,000, and I would not give over $60,000 with that depreciation on it.
M'r Jackson was to bid $60,000, if they offered the prop-
193 erty upon the terms and conditions by which they offered it to
me by the deed, by which it was not worth as much by $30,000. The reasons I gave to M'r Jackson for this was, that the stabling being mortgaged forever, was an encumberance upon it, and the new conditions which they would make in regard to horses and carriages, by which they could go out and give the stock proprietors, after two years, the Glen House, and the line revert to the proprietors of the stage company, Cummings, Jackson & Co. M'r Jackson had been a clerk in the office of Tudor Company, and had been in the habit of doing business for me. I do not know whether he was coming to New York, or whether I went to Boston. I think M'r Jackson came on to New York before the sale took place, and I think I saw him at 95 Wall street.
194 I think he came partly to see me on this business. The matters in
the deed tendered me, that I thought depreciated the property so much, was, in the first place, encumberances upon the property; mortgages unknown to me; debts unknown to me; interest unpaid.

Secondly, there were also clauses in the deeds which were not in the terms and conditions, which terms and conditions were, that they should have the livery stables and business of the house, which was put in the stage-contract provision, and which put a perpetual mortgage on the stable. I requested them to specify what the condition of the horses and carriages were, and strike out the livery stable and business of the house, which were not in the terms and conditions of sale. I objected to this clause: "This sale is made subject to the conditions of the stage mountain routes, horses, and carriages, which are, that the pro-
195 prietor of said Glen House shall allow the proprietors of said property to have the exclusive staging, livery, and stable business of said house." I refer to that condition in my letter to M'r Jackson as depreciating the property thirty thousand dollars, and killing the property.

In the last sale they included the mountain route to the summit of Mount Washington, which is a private toll-road, for which they charge one dollar for every person going up. If the party holds the exclusive right of staging over that mountain road, they could say to the hotel proprietors that the hotel must pay that toll, and they put into that deed the exclusive livery and stable business of the house. They have that as a perpetual mortgage upon the property. The person who leases the hotel cannot do anything. He is subject to *to* the
196 people who keep all the horses, and subject to them forever. I objected to all that. I asked M'r Cummings to have that changed, and he declined to do it. The objection originated with me, and not with Judge Davis.

The defendant also offers testimony to prove that the Glen House property would be more valuable with the control of the livery and stage business than without it, and that it would be important to a person owning the hotel to have the control of the livery and stage business.

The defendant also called as a witness CHARLES H. MINOT, who stated: I was present at the second sale of the Glen House property in June, 1871. The terms stated by the auctioneer, in the presence of the plaintiff and M'r Weeks, were the following: "Ten days will be allowed
197 to examine the title, within which time the property must be settled for at the office of the auctioneer. Five thousand dollars will be required of the purchaser on the spot, which will be forfeited to the sellers if the terms are not complied with; but the forfeiture of the five thousand dollars will not release the purchaser from his obligation to take the property. Fifteen thousand dollars shall be paid on the delivery of the deed, and one-half of the balance of the purchase money on September 1st, 1871, and the remaining balance on September 1st, 1872; there are mortgages on the property amounting to about $51,000, and any amount not already secured by mortgage, after the payment of the twenty thousand dollars, must be made secure to the satisfaction of the sellers. The property will be sold, subject to the conditions
198 of the sale of the stage and mountain routes, &c., which are that the proprietors of the route shall have the exclusive stage and mountain business of the house, and that the house shall be kept open as heretofore."

Before the sale the auctioneer handed me the terms of sale, and after reading them, I stated that the condition, "the house to be kept open as heretofore," was irregular and wrong, and if insisted upon I should have to interrupt the sale by stating my objections. After a long conversation with me the auctioneer stated that the sale would proceed.

I was familiar with the terms of the first sale, and the terms as proposed for the second sale was entirely at variance with them. The auctioneer then proceeded to read the terms of sale as before stated. I in-
199 terrupted the sale, and stated that the terms of keeping the house open, as heretofore, were irregular and wrong, placing the purchaser of the house at the mercy of the purchaser of the stage and mountain route, &c. I saw the purchaser sign the written terms of second sale. I saw the terms of the first sale again May 15th 1872, in Boston. I took a copy of them. The paper now produced by me is such paper (which is the one signed by M'r Grafton and heretofore mentioned). I observed the signature of M'r Cummings and M'r Weeks appearing on the second sale agreement. I am acquainted with their signatures, and they were genuine. That property was knocked down at that second sale under conditions, one of which was that the house should be kept open as theretofore, which were not withdrawn or qualified in any
200 respect during the sale. The written terms and conditions of that sale were submitted to my inspection before the sale commenced, and I have stated them correctly, and the fact in regard to keeping the house open as theretofore is distinctly impressed on my memory as well as the other facts stated.

On cross examination the witness stated that he was a merchant; that after the first sale of the property, M'r Walker, who acted as auctioneer, and M'r Cummings, the plaintiff, met M'r Grafton, himself, and produced certain deeds, and on behalf of the defendant, the witness handed a paper which was read by M'r Walker and M'r Cummings on that occasion, and which had been prepared by M'r Payne, the defendant's counsel. Witness did not attend the second sale at the re-
201 quest of any person, but acted there for himself, and when he made the objections to the term of sale mentioned, he did not state in whose behalf he made them. On the occasion of the second sale, M'r Weeks and his counsel asked witness if he was authorized to act in reference to the first sale, and he replied no. There was nothing further said about M'r Grafton, except that they may have talked among themselves, which made no impression on witness's mind. Witness was ready to purchase at a satisfactory price and on satisfactory terms. He learned from the newspapers when the sale was to take place. The defendant did not say anything to him about going, or about the sale before there, but wrote that such a sale was to take place. He said nothing to witness, and witness had not seen him since the 26th of May,
202 1871, and did not in any way represent or act for the defendant at the June sale, and the auctioneer did not state anything at the second sale beside what he read as the terms of sale. Witness saw the terms of the first sale, and saw them again yesterday (May 15, 1872), in the possession of the auctioneer, and made a copy of them. The auctioneer also handed me what he stated to be an exact copy of them, on or about the 26th of May, 1871, which witness found to be a copy of the original, and found to be correct in every respect.

Redirect:

The paper produced in evidence and now marked "Exhibit B, E. L. O., May 16, '72," is a copy of the terms of sale furnished to witness by M'r Walker, and which witness compared with the original. The signature of the defendant to the terms of sale, which the auctioneer showed
203 him, was the genuine handwriting of the defendant, and the Exhibit B, now shown me, contains everything that it now contains on the front and back. At the time I compared this exhibit with the orig-

inal there was no endorsement or writing on the back of the original terms sale of the of first sale. The back of the original terms of sale at that time did not have the name of M'r Walker, the auctioneer, written on it. It was a perfectly blank back, and the name of M'r Walker did not appear in any part on those terms of sale, either on the front or back. The printed advertisements were wafered on the terms of sale, both on the first and second sale, which do not appear on Exhibits A & B, but all the writing that there was upon them appears upon them.

204 Q. In asking you whether Exhibit B shows all the writing contained in the terms of sale, I meant to ask you also whether that Exhibit B contained also all the writing appearing in the contract signed by Joseph Grafton, or on the back of that contract. Please state whether the contract signed by Joseph Grafton in Exhibit B contains all that was in the original, both in front and on the back.

A. It does, and at the time I took the copy the name of M'r Walker did not appear there.

There were pasted on the original paper, of which Exhibit B is a copy, the two advertisements, one of May 2, 1871, and the other commencing "Valuable hotel property for sale," and ending by applying "to J. W. Weeks, administrator, at Lancaster, N. H., or S. H. Cummings, at Farmouth Hotel, Portland, Me."

205 Defendant's counsel then read in evidence mortgage by Joseph M. Thompson, of Green's grant, and his wife, to Nathaniel Weston, for $20,000, on the Glen House property in question, conditioned for the payment of his three notes, all of even date with the mortgage, to wit: December 26th, 1865, and all payable to Weston or order; one for $5,000, one for $7,000, and one for $8,000, each payable in two years, with interest semi-annually. The mortgage was recorded December 22, 1865, and marked "Def't's Ex. 2."

Defendant's counsel also read in evidence mortgage covering these premises, dated March 11th, 1869, and recorded January 18th, 1870, from Joseph M. Thompson and Stephen H. Cummings, of Green's grant, in consideration of $35,000 paid by Nathan Cummings, of Portland, in the county of Cumberland, being conditioned for the payment of

206 $35,000, with interest one year from date. (Copy.)

Defendant's counsel also read in evidence a mortgage from Joseph M. Thompson to Nathan Cummings, $2,300; to Thomas R. Jones, $800; to Libby & Co., $500; all payable in one year from date; with interest. The mortgage is dated May 6th, 1855, and was discharged on September 1st, 1865, as to Cummings' note, and on February, 5, 1870, as to Libby note. Marked "Defendant's Exhibit 4." (Copy.)

Defendant's counsel also read in evidence a mortgage at the time unsatisfied, of record, executed by Joseph M. Thompson to the Atlantic and S't Lawrence Railroad Company, for $3,000, on this same property, dated Sept. 1, 1852. By various transfers it became vested in the successor of that road, and finally in Nathan Cummings, and it was

207 discharged of record on the 31st day of January, 1866, by Cummings. Marked "Defendant's Exhibit 5." (Copy.)

Defendant's counsel also read in evidence the statute law of New Hampshire relative to actions and processes, from section 12 of the 201 chapter, as follows: "No action shall be maintained upon a contract for the sale of land unless the agreement upon which it is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereto authorized by writing."

Defendant's counsel also read in evidence from the first volume of

New Hampshire Reports, at page 157 and succeeding pages, the report of the case of Sherburne against Shaw and the opinion of the court.

The defendant then read in evidence the deposition of WILLIAM HEYWOOD, as follows:

208 I am 69 years of age, and reside in Lancaster, N. H. I am a lawyer by profession and have been in practice 42 years. I am still in active practice. The practice of the probate courts in the State of New Hampshire is regulated by the statute laws of the State. The statutes regulating that practice are to be found in the general statutes of the State enacted and published by authority in 1867, and which took effect on the first day of January, 1868. There have been some slight alterations in the probate laws in annual acts since, but none that alter the authority or jurisdiction of the probate court.

The authority under the laws of New Hampshire which the probate court has to order the sale of real estate of a person dying intestate is set forth in chapter 182 of said general statutes, and may be

209 granted for the payment of debts—

1st. When the personal property is not sufficient for that purpose.

2nd. When the whole real estate is so situated that a part cannot be sold without injury to the whole, then license may be granted for the sale of the whole, although it may be more than sufficient for the payment of the debts. This power is exercised upon the application of the administrator, setting forth the reasons for granting the license to the probate court which grants a license. The probate court may order the sale of the real estate of the deceased or of any interest which he had in the land, or of growing timber or wood upon the land. I think the probate court cannot qualify or limit or encumber that real estate or the interest of the intestate therein in any manner, or reduce it

210 in any way. I think the provisions of said chapter must be followed, and I see no power in a probate court to create any limitation or incumberance.

Q. Can the administrator sell the real estate of an intestate in any other manner or otherwise than as licensed by the probate court?

A. I think the license is the authority under which the administrator acts. Our courts have decided that in order to insure the proper execution of the authority it must be pursued strictly.

Q. Is there any law or authority in the State of New Hampshire authorizing an administrator to sell an estate in the lands of an intestate less than that licensed to be sold by the probate court, or to sell subject to any easement created by himself, or in any other terms than those authorized by the license from the probate court?

A. There is no provision in the statute that would authorize

211 a departure from the terms of the license in making the sale.

Q. Will you examine the paper now shown you, which is admitted to be a copy of the license granted by the probate court of Coos County, New Hampshire, to James M. Weeks, administrator of J. M. Thompson, to sell the interest of said Thompson in the Glen House property, and state if under that license the administrator had the right to sell the said property or the interest of said Thompson therein, subject to an easement in favor of the stage route and stage business connected with said property?

A. I have examined said copy of the license, and I think the sale should have been strictly according to the license, and without affixing conditions upon the property sold; but of this I am not certain, for I did not find New Hampshire decisions bearing upon the point.

212 Q. What is the law of New Hampshire with regard to a contract for the purchase and sale of lands; what were the requisites to make such a contract binding?

A. That some memorandum thereof shall be in writing and signed by the party to be charged or by some person by him thereto authorized in writing. (See section 12, chap. 201, Gen. Statutes.)

Q. Would a written contract for the purchase or sale of lands which did not show who were both parties to the contract, be a valid and binding contract according to the laws of New Hampshire.

A. I think not. The court decided in the case of Sherburn v. Shaw, 1 N. H., 157, that such a contract would not be valid.

Cross-examination:

213 Q. Are not the probate courts of this State courts of record, and are not their judgments upon matters within their jurisdiction conclusive? Does not the statute provide for appeals from decisions of probate courts? Is not that the only way in which their decisions can be revised, and can the decision of a probate court be impeached collatt*e*r'ly?

A. They are courts of record. Their judgment upon matters within their jurisdiction are conclusive if not appealed from. There are provisions for appeals from their decisions, and a decision of the probate court can't be impeached collaterally, but must be revised by such appeal.

Q. Do you say that in the sale of real estate in which an intestate has an interest, an administrator by the laws of New Hampshire may not make provision for a judicious sale of personal property in which said deceased has an inerest, without said sale of real estate being void?

214 A. I did not intend to say so.

Q. Does not an administrator in his position by the laws of New Hampshire stand as a trustee, and is it not his duty to see that both the real and personal property be sold to the best advantage?

A. Yes.

Q. What is the provision of the statute of New Hampshire, where the conduct of an administrator in making the sales of real estate is such as to be fraudulent?

A. If his conduct is such as to be fraudulent it is a breach of his administration bond.

(See section 12, ch. 182, G. S.)

Q. Supposing a person bids off property at an administrator's sale with full knowledge of the terms of the sale, what right has he by the law of New Hampshire afterward to complain of said terms, and on 215 account thereof refuse to fulfill his contract of purchase?

A. I think that the general rule in this State is that a man understandingly buys property and is offered the title to what he buys he must take it, but he had a right to see that the proceedings are such that he will get a title to what he buys.

Q. What would be the effect, as you understand the laws of New Hampshire, provided there be tendered to such purchaser such titles as he agrees to accept under his contract of purchase?

A. That would be a performance of the contract on the part of the seller, but they should convey the title that he had a right to have under his contract.

Q. Does not the doctrine of estoppel in pais fully obtain under the decisions of New Hampshire?

A. I think it is recognized in this State as at common law.

Q. Will you state the provisions of the New Hampshire stat-
216 utes in relation to a surviving partner's taking possession of the partnership property and closing up the affairs of the partnership?

A. The provision is contained in G. S., chap. 106, sec. 3 to 8 inclusive, to which I refer.

Q. What is the law of New Hampshire as to the right of a surviving partner and partnership creditors to have partnership property and the avails thereof applied in payment of partnership debts?

A. The partnership debts are to be paid to the partnership creditors in the first instance. This is the right of the surviving partners and partnership creditors in preference to private creditors or heirs.

Q. Has not the case of Sherburn against Shaw, to which you refer, been questioned in the case of Britton vs. Angier, 18 N. H., 420?

217 A. All that is said by Judge Woodbury in regard to the necessity of having a consideration for the agreement expressed in the memorandum of the agreement has been overruled in the last-named, case, as I understand it. The main point decided in the first-named case is not in question in the second case.

Defendant's counsel also read in evidence the deposition of BENJAMIN F. WHIDDEN, as follows: I have been in the practice of law over 20 years; am judge of the probate court of Coos County, New Hampshire, and have held that office since April 20, 1868; am still in active practice as a lawyer in the courts of New Hampshire. The practice in the probate courts of New Hampshire is regulated by the statutes of this State, and by the decisions of the law courts upon the stat-
218 utes. The authority of the probate court to grant license for the sale of real estate of an intestate is contained in chap. 182, of the general laws of New Hampshire. This authority can be exercised when the personal property is insufficient to pay the just demands by law chargeable to the estate. The authority of the probate court in ordering the sale of the interest of the intestate in real estate is regulated by the statute and is contained in said chapter. I do not understand that the probate court has any other authority in issuing a license for the sale of real estate of an intestate, than to license the sale of just such interest as the intestate owned at the time of his decease. I think the probate court cannot qualify or limit or incumber that interest
219 in any manner or reduce it in any way, and I think that by the statute the administrator cannot sell the real estate of an intestate in any other manner or otherwise than as licensed by the probate court. I think he must follow the license strictly.

There is no provision in the statute giving the administrator discretion to sell otherwise than as his license directs.

Q. Will you look at the paper now shown you (admitted to be a copy of the license issued by the probate court of Coos County to James W. Weeks, administrator of J. M. Thompson, April 4, 1874), and state if under that license the administrator had any right to sell the Glen House property, subject to the stage route and staging business?

A. The license issued to said administrator is in the usual
220 form, and follows the provisions of said chapter, and by this chapter he is not authorized to sell subject to any easement created by him.

Q. What is the law of New Hampshire in regard to a contract for

the purchase and sale of lands? What are the requisites to make such contracts binding upon both parties?

A. The law of this State on this subject is in the general statutes, ch. 201, section 12.

Q. Would a contract for the purchase or sale of land in New Hampshire, which did not show who were both parties to the contract, be a valid contract according to the laws of New Hampshire?

A. The construction put upon this section by the law courts of this State is in the 1 N. H., 157, Sherburn v. Shaw, which is that "a memorandum in writing of a contract for the sale of lands is not a
221 sufficient memorandum within the meaning of the statute of frauds, unless it in some ways shows who are the two parties to the contract." This case is law in this State at this time, and is not modified or explained except as is found in the case of Britton vs. Angier, 18 N. H., 425. This modification in the last case is: "It is not necessary that the writing should state the consideration of the promise.

On his cross-examination, the witness testified: Probate courts of this State are made by the statute courts of record, and their judgments or decisions upon matters within their jurisdiction are conclusive, and can only be revised or impeached upon appeal, for which the statute provides; and the decisions of said courts cannot be impeached collaterally.

Q. Do you not understand that an administration, by the laws
222 of New Hampshire, must exercise their utmost endeavours that the property belonging to any estate of an intestate, both real and personal, shall be sold under his license to the best advantage of the estate, or the persons therein interested?

A. I do.

Q. Cannot an administrator in a sale of his intestate's interest in real estate make provision for a judicious sale of personal property in which the estate has an interest without making the sale of said real estate void?

(Objected to by defendant's counsel as irrelevant, incompetent, and immaterial, and as assuming facts not proven and not in issue.)

A. By the laws of this State a real estate license does not embrace a license to sell personal property. License to sell personal prop-
223 erty is granted on a separate petition, and by a separate decree, and the practice has always been to have separate returns. I think the law of this State requires an administrator to follow his license. I think it should appear in the sale of real estate how it was sold, and for how much. If it appears in the report how this sold and how for much, and at public auction to the highest bidder on a sufficient notice, a sale of personal property on the same occasion might aid in the sale, but the probate court did not connect these two licenses.

Q. Does not an administrator, in his position, by the laws of this State, stand as a trustee, and is it not his duty to see that both real and personal estate in which the intestate has an interest be sold to the best advantage?

A. So far as taking care of the property is concerned, he
224 does stand as a trustee. Whenever he is licensed to sell this property, it is his duty to the best advantage.

Q. In making sale under a license can he not exercise any discretionary powers in making his sale such as are usually given or exercised by trustees?

A. An administrator, in the settlement of an estate, has many dis-

cretionary powers, but I think trustees' powers would differ very often from those of an administrator. In a sale of real estate under license he gets his power by virtue of the license.

Q. Will you state what, if any, limitations there are in the statutes of this State, or in the license to sell real estate, as usually granted by the probate court, other than that the sale shall be to pay debts chargeable to the estate and those contained in the terms of an admin-
225 istrator's oath found in section 8 of the chapter referred to, in a case where the license is granted to sell the whole real estate, and not limited as to the amount to be raised by the sale?

A. The law is contained in chapter 182, before referred to, and there are no other limitations than those referred to.

Counsel for the defendant then read in evidence an agreement by Milliken to sell to Stephen H. Cummings a one half interest in the property in Green's Grant, &c., conveyed to them in deeds dated June 17th, 1871, marked "Defendant's Exhibit 6."

No. 24.—*Def't's Ex.* 6.

In consideration of one dollar and the matter hereinafter set forth, it is agreed Weston F. Milliken and Charles R. Milliken agree to sell and transfer to Stephen H. Cummings one-half ($\frac{1}{2}$) part of all their
226 interest in the property in Green's Grant known as the Glen House property, and the same described in the deed of J. W. Weeks, administrator, to them, dated June 17th, 1871, and in deeds to them of same date, from said Cummings, Charles W. Thompson, & al., and from Catherine M. Thompson, and one-half of all their interest in the furniture and other personal property in and about said hotel purchased by them June 17th, 1871, and one-half of their interest in a contract dated June 17, 1871, with John Lindsay relative to the management of the horses and teams connected with said hotel, and one-half ($\frac{1}{2}$) of all the property substituted for any of said property, and one-half of all the proceeds, insurances, and other fruits of the same, or either of them, and one-half of all the profits of running said hotel; said transfer
227 to be made as soon as the following payments are made by the said Cummings to them, to wit: ninety-one hundred fifty-six $\frac{5}{100}$ dollars ($9,156. 05) cash, ten thousand two hundred fifty dollars ($10,250) Sep. 1, 1871, and the same amount ($10,250) Sep. 1, 1872, with interest, and one-half the present value of the annuity bond given by said Millikens to Catharine W. Thompson, dated June 17th, 1871, for the payment of annuity of ($500) five hundred dollars during her natural life, which latter sum is to be paid cash.

And until the above payments are made, said Millikens are to retain the legal title of all said property, its renewals, additions, proceeds, profits, and insurance. Said Millikens are to assume and discharge from the said half of the above described property to be conveyed said Cummings, as aforesaid, the mortgages now thereon or to obtain as-
228 signments to said Cummings of one-half of said mortgages on which now remains due forty-six thousand forty-four $\frac{64}{100}$ dollars ($46,044.64), all without expense to said Cummings, but said Cummings shall pay one-half part of all other sums hereafter paid by said Millikens to discharges taxes or other incumbrances, or in any manner for the benefit of the property.

Notwithstanding this agreement said Millikens shall have the right to use and dispose of any of said personal property, or add to or renew the

same in the usual course of hotel business, all the same to be accounted for as herein provided, and likewise to improve the real estate as they deem proper for the purposes of the business aforesaid.

And in consideration of the premises said Cummings agrees to
229 pay to said Millikens all the sums aforesaid, including one-half part of whatever sums they may expend as aforesaid for taxes, incumbrances, improvements, and in conducting the business aforesaid, being first credited with all such sums as are to be credited to him as aforesaid; and further to pay them one-half part of all expenses and losses connected with or arising from the management of said property and the conducting of said hotel business.

And said Cummings further agrees that until he receives the conveyance as aforesaid he will devote his whole time and attention without compensation to the interest of said Millikens in and about the care of said property and the management of said hotel.

June 19th, 1871.

WESTON F. MILLIKEN.
CHARLES R. MILLIKEN.
STEPHEN H. CUMMINGS.

Witness:
W. L. PUTNAM to W. F. M.
CHA'S M. THOMPSON to C. R. M., S. H. C.

(Endorsed:)

230 PORTLAND, *Sept.* 15, 1872.

In consideration of one dollar, I hereby assign the within agreement and all my rights under the same to Augustus Cummings as collateral security to my note to him of this date of five thousand one hundred and seventeen $\frac{50}{100}$ dollars on demand, with interest semi-annually at eight (8) per cent.

S. H. CUMMINGS.

Witness:
JOHN M. CUMMINGS.

PORTLAND, *Jan. 6th*, 1873.

In consideration of one dollar, I hereby assign the within agreement and all my right under the same to Augustus Cummings as collateral security to my note to him of this date of four thousand and two hundred dollars on demand, with interest semi-annually at seven and a half per cent.

S. H. CUMMINGS.

Witness:
JOHN M. CUMMINGS.

PORTLAND, *Feb.* 13, 1874.

In consideration of one dollar, I hereby assign the within agree-
231 ment and bond to Weston F. and Cha's B. Milliken, Augustus Cummings, interest having been duly satisfied.

S. H. CUMMINGS.

Witness:
H. EATON.

Counsel for defendant then offered copies of the terms of sale and advertisement which were furnished by plaintiff's counsel on request; but the same were objected to by the plaintiff's counsel, and the pre-

siding judge thereupon excluded the same, they being already in evidence; to which ruling and decision defendant's counsel then and there duly excepted.

JOHN PREBBLE, a witness called for the defendant, testified that he was an assistant clerk and bar-keeper at the Glen House; that at the time of the first sale I stood on the piazza and was paying attention to what was said by the auctioneer. I do not remember that I heard
232 him say anything about mortgages at that time, nor about the staging. I think that the hotel property without the staging and horses was a good bargain in June, 1871, at $90,000. The witness further stated that he did not know what the market value of the property was.

The defendant thereupon rested, and the plaintiff called as a witness A. W. THOMPSON, who testified that he was the son of Joseph M. Thompson, the former owner and keeper of the Glen House, who died in October, 1869; that he acquired a half interest in the stage and livery property of the Glen House, John Lindsay having bought it, and the witness having bought half of it about the 21st of June, 1871. The purchase was made that day from Stephen H. Cummings. Prior to May 16th, 1871, there had been nothing done in relation to a sale of this staging and livery property, to the knoweldge of the witness,
233 nor was anything done on that day in relation to the sale that the witness was aware of.

Q. Can you state what made the difference in the price received for the same property on the 16th of May, and on the second sale on or about the 9th of June?

(To this question and evidence the defendant's counsel objected on the ground that it was irrelevant and immaterial to any issue in this action, and that it was not competent to show in this manner the damages claimed in this action, which objection the presiding judge overruled; to which ruling and decision the defendant's counsel then and there duly excepted.)

A. There were a good many objections why people would not bid on the sale in June. There were a good many repairs to be made, and the house could not be got ready as it should have been in time for
234 business for that season. There was not time to get the requisite number of servants and help to run it. It takes over a hundred persons to do the business of the house. I think there was no profit on the livery business. It cost as much as it came to. On his redirect examination the witness said the staging and livery business would be of no value if its proprietor did not have the good-will of the house and the business of the house. The mountain carriages are only fitted up for mountain business. The horses and stages coaches might be used on other roads.

It was conceded by both parties that the title derived by Joseph M. Thompson from John Bellowes, by deed dated the first day of April, A. D. 1852, recorded in registry of deeds in Cass County, New Hamp-
235 shire, volume 49, p. 409, vested in said Thompson a valid title to the premises known as the "Glen House," in Green's grant, in the county of Coos.

Counsel for plaintiff read to the jury the bond from Millikens to Cummings, which *was* already been read in part, date June 19, 1871.

Counsel for plaintiff read in evidence an assignment by Altantic & S't Lawrence Railroad Company to Cummings, of their mortgage and the discharge of said mortgage.

NATHAN CUMMINGS, a witness called on behalf of the plaintiff, testified: I am the father of the plaintiff, and 79 years old. After that sale on the 16th of May I was at the Glen House, right after it.

Q. Do you recollect your son asking you to take a message to Capt. Grafton?

236 (To which question the counsel for defendant renewed the same objection as was interposed to similar testimony on the examination of the plaintiff, and as irrelevant and immaterial, which objection the presiding judge overruled; to which ruling defendant's counsel duly excepted.)

A. I think the same day of the sale. I went up to the Glen House and M'r Cummings told me he had to go to another place—to the sale of the Jackson farm, I think, and should not go down. When I went down I delivered a message to M'r Grafton. I told him that Cummings had a large number of men employed at a very considerable expense, and he wished to know whether they should continue the employment or dismiss them. Captain Grafton referred me to M'r Woodbury Davis.

237 I went to him and said that I was referred to him by M'r Grafton, and I think I told him what I was referred to him about and gave him the message, and he said that he was going to the Glen House himself.

(Counsel for plaintiff offers in evidence a letter from Woodbury Davis to S. H. Cummings, which has already been marked for identification; to which offer defendant's counsel objected as immaterial, and also that the statement therein were not shown to have been authorized by or sanctioned by defendant, which objection the presiding judge overruled, and defendant's counsel duly excepted.)

Letter read in evidence and marked "Plaintiff's Ex. No. 25:"

DEAR SIR: I came up to-day hoping to confer with you in re-

238 gard to the purchase of the Glen House. I don't know but what Lindsay and Barrow intend to take it. Some things they said indicated as much, and Grafton offered to let them take it at his bid, and let them have their own time to pay him his claim. But I find Mrs. Thompson is strongly attached to the place. The judge of the probate court will make her an allowance. It occurred to me that the purchase might be made in this way. One-tenth would be $90,000:

S. H. Cummings, $\frac{3}{10}$	27,000
Lindsay, $\frac{3}{10}$	27,000
Barron, $\frac{3}{10}$	27,000
M'r's Thompson, $\frac{1}{10}$	9,000
	$90,000

This would relieve you from most of the care. It would give M'r's Thompson an interest in it. The $9,000 due Grafton is as much as her

239 share, and I will agree to let it be until she has time to pay it from the profits. I go home to-morrow, but I wanted to propose this to you, as Grafton really don't want anything to do with the property, though he thinks Stearns, or some one of their leading hotel men, may have some young man that they would like to put into the house.

He will try to dispose of it in that way, but hopes that before doing it I shall be able to write to him that it will be taken up here.

Very truly yours,

WOODBURY DAVIS.

S. H. CUMMINGS, Esq.

The mortgage made by J. M. Thompson to the Atlantic & St. Lawrence R. R. Co., and assigned afterwards to me, was paid at same time, and was discharged of record, after the sale, I think.

Q. There has been put in evidence here a mortgage from Joseph M. Thompson to yourself for the sum of $35,000. Was all of that
240 due at the time of this first sale in May?

A. I cannot tell how much of it. The deed was given to secure me against liabilities, as they might arise in the Casco bank, from paper that I had endorsed, and that mortgage was to secure $35,000, which was the extent of the liability that I was to be under.

Q. How much was due at the time of the first sale?

A. It was paid off by Mr. Milliken. The amount of all my liabilities at the Casco bank was paid off by Mr. Milliken. We went down together to the bank, and the paper was produced, and he paid it at that time. The amount to be paid then was $24,000 and about $130, or something like that. Those liabilities had not changed any way, increased or diminished, between the time of this first sale and the time of this payment.

241 Cross-examination:

I do not know whether these notes for which I was liable had been reduced, but I don't think there was any addition to my liability after the first sale. I mean that after the first sale there was no addition to my liability. I do not know how much I had endorsed for them before the sale. I know that was the amount I have stated. When it was paid it was $24,130.

Q. Whether anything had been paid between the first sale and that time you do not know, of course?

A. No, sir; that was the final consummation and settlement of it. There was paid $24,000. I think that was paid there—the amount and interest. I did not know the amount of the liability at the Casco bank until it was settled by Mr. Milliken. Between the time of the first sale, May 16th, and August there was no alteration in the accounts.
242 That balance of $24,000 was what had been due a considerable time, and it had not been changed.

Plaintiff rests his case.

Thereupon the defendant's counsel requested the judge to charge as follows, and to instruct the jury:

1st. No contract was made for the purchase and sale of real estate between the plaintiff and defendant.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and duly excepted, and the exception was then and there duly noted.

2nd. The paper signed by the defendant did not constitute a complete contract between the parties. No vendor was named therein, and the endorsement by the auctioneer, after the commencement of
243 the action, gave no validity to the instrument upon which a recovery in this action can be based.

The court charged the jury substantially in accordance with this request.

3rd. If the sale was made on the part of the plaintiff and Weeks, the administrator, this action cannot be maintained by Cummings alone, and the defendant is entitled to a verdict.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

4th. The administrator, Weeks, not being a party plaintiff to this action it cannot be maintained.

244 The court refused to charge or instruct the jury in accordance with the request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

5th. Under the evidence in this action the only agreement on the part of the defendant which the jury can consider, if any, is Exh't E, No. 1, which was subscribed by the defendant.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

6th. The paper "Exhibit F, No. 6" did not form any part of the contract between the parties, and cannot be regarded or considered by the jury.

245 The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

7th. The jury are to disregard all oral statements and representations made by the auctioneer not contained in the paper writing which formed the contract between the parties.

The court directed the jury that by the terms and conditions of sale were meant written terms and conditions.

8th. Under the evidence the real estate in question did not belong to the copartnership of J. M. Thompson & Co. Plaintiff was not authorized to make a sale thereof and a conveyance thereof in his character as surviving partner.

246 The court refused to charge or instruct the jury in accordance with this request, as there was no claim that he was authorized to make sale and a conveyance thereof as surviving partner; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

9. The deed tendered as executed by the administrator did not confer or grant any title to the real estate.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the defendant's counsel then and there duly excepted, and the exceptions was then and there duly noted.

10. Weeks, the administrator, was required by his license to make a sale at public auction. He could not adopt as his own a sale at
247 auction made by another party having and representing in said sale a distinct interest in the property.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

11th. The administrator, Weeks, could not sell the property in the manner prescribed and according to the terms prescribed in his license.

The court charged that the three deeds which were tendered by the

plaintiff conveyed a good title subject to the mortgages, and for the refusal to charge or instruct the jury in accordance with this request, the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

248 12. The license did not authorize the administrator to make the sale or execute the conveyance mentioned in the evidence in this suit.

The court refused to charge or instruct the jury in accordance with the request; and the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

13. The plaintiff Cummings, in making the second sale, being interested in the purhasec, and subscribing the agreement as purchaser, thereby destroyed any claim he might otherwise have had against the defendant.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

249 14. If a valid sale has been proven on behalf of the plaintiff and a breach shown by the defendant there cannot, in any view of the evidence, be a recovery of more than nominal damages.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exceptions were then and there duly noted.

15. Under the sale the defendant was entitled to a deed free and clear of all incumbrances, and subject only to the conditions specified in Exhibit E, as to the staging.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for defendant then and there duly excepted, and the said exception was then and there duly noted.

250 16. By the terms of the sale the defendant was entitled to a conveyance of a good estate in fee-simple, free of all incumbrances.

The court charged that if Exhibit F was not a part of the conditions of sale the defendant was entitled to a deed in fee-simple, free from all incumbrances, unless that condition was waived by the defendant.

For the refusal to charge as requested the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

17. The offer of a deed or deeds while the premises were incumbered by mortgages was not an offer to perform on the part of the plaintiff according to the condition of the contract.

251 The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for defendant then and there duly excepted, and the exception was then and there duly noted.

18. There is no evidence on the part of the plaintiff which will justify the application by the jury of any rule of damages recognized by the law.

The court refused to charge or instruct the jury in accordance to this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

19. The sale of the real estate at auction did not furnish the measure of damages.

The court charged in regard to the measure of damages, and in re-

gard to the importance of a fair sale in arriving at the estimate of damages, and for a refusal to charge or instruct the jury in accord-
252 ance with this request, the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

20. No pecuniary loss is shown to have been sustained by the plaintiff.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

21. The evidence shows that the property was worth at the time of the second sale as much as it brought at the first sale.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

253 22. There is no evidence that at the time of the second sale the property was not worth $90,000.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

23. The deeds to the Millikens carrying out the second sale, which show their privileges and rights, contain no restrictions of any kind, are in consideration of one dollar, and furnish no proof of what they did or did not pay for the property.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

254 24. The title conveyed to the Millikens being free of all restrictions is a waiver or discharge of any claim the plaintiff might have, or at least an estoppel to this action.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then & there duly noted.

25. On the whole evidence the defendant is entited to a verdict.

The court refused to charge or instruct the jury in accordance with this request; to which refusal the counsel for the defendant then and there duly excepted, and the exception was then and there duly noted.

The court thereupon charged and instructed the jury as follows:

GENTLEMEN OF THE JURY: On May 16th, 1871, the real estate
255 known as the Glen House property, in the State of New Hampshire, and the furniture in said house, was sold at public auction. The legal title of two-thirds of the real estate upon the land records of the county wherein it was situate in the name of J. M. Thompson, heretofore deceased, and the legal title of one-third of the real estate stood in the name of Stephen H. Cummings. The one-third of the property belonging to Cummings had been purchased by him previously from M'r Thompson with the individual funds of M'r Cummings. Prior to the death of M'r Thompson the Glen House, which was a large summer hotel, had been managed and conducted by M'r Thompson and M'r Cummings as partners, under the name of J. M. Thompson & Co. By the terms of the partnership, which was a verbal one, M'r Thompson
256 was to have two-thirds of the profits and M'r Cummings to have one-third, and they were to share losses in the same proportion.

On the death of M'r Thompson, the surviving partner settled for the affairs and business of the partnership, accounting to the administrator of M'r Thompson for his share of the property after paying the debts and expenses.

The auction sale was conducted by one A. R. Walker, an auctioneer employed by M'r Cummings for that purpose, and the real estate known as the Glen House property and furniture were bid off by the defendant at the sum of $90,000. He signed the agreement of purchase which has been read to you, and which is in these words:

I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the Glen House, with the furniture belonging to it, in Green's grant, New Hampshire, and sold at auction
257 Tuesday, May 16, 1871, at eleven o'clock a. m., and for the sum of $90,000, said property being more particularly described in the advertisement hereunto affixed, and I hereby bind myself, my heirs, and assigns to comply with the terms and conditions of the sale as declared by the auctioneer at the time and place of sale.

JOSEPH GRAFTON.

Subsequently, and prior to May 26, 1871, three deeds, which have been shown, were prepared and executed by M'r Cummings and M'r Weeks and M'r's Thompson, and were tendered by Cummings to Captain Grafton on that day in the city of Boston, where these parties met by previous appointment. The defendant refused to accept the deeds and complete the purchase on the alleged ground "because of the conditions inserted in the papers now tendered, which are not in ac-
258 cordance with the terms stated in the sale, because of the mortgages now on the estate outstanding, and because the title is otherwise not satisfactory."

On June 9, 1871, the same property was again sold at auction to a M'r Milliken, for the sum of $61,000, who subsequently accepted deeds thereof and is now in possession of the property.

This action is brought by M'r Cummings & against Capt'n Grafton to recover damages arising from this alleged breach of contract.

While a contract for the sale of real estate may be and often is originally entered into by parol, yet it is necessary that in any action at law which shall be brought to enforce that contract, it shall be proved to have been made and its essential terms shall be specified by a written note or memorandum thereof, signed by the party to be charged, or by some person authorized in his behalf, and in the State of New
259 Hamsphire, authorized in writing. But it is not necessary that the entire elements or details of the contract should be contained in one written memorandum. They may be contained in one. They may be contained in more than one. When contained in more than one, it is necessary that the papers should either be referred to in writing, so as to be evident that they all relate to the same contract, or that they should be sufficiently connected in meaning with the other writings relied on as from their internal evidence and without the necessity of parol explanatory evidence to show that they relate to one and the same contract.

It is not necessary that such a contract shall be signed by both parties, but it is sufficient that it is signed by the party to be charged thereon, he being in this case the defendant. That defendant signed
260 this contract is not denied, and the requisite of the statute requiring signature is fully complied with. The essential elements

are the signature of the party to be charged, a statement of the property contracted for, the price, the terms of payment, and in general such a description of the contracting parties that they can be ascertained and identified.

Besides the objection that I have just suggested in regard to the signature of defendant which I have disposed of, the only objection I understand in regard to the validity of this contract upon its face is that the names of the contracting parties with defendant do not appear upon the instrument, and that it does not appear from the instrument who the party is with whom he was contracting and who was the seller of the land.

The object of this statute is to avoid the dangers incident to
261 parol evidence, and it is true that written memoranda which purport to contain the contract must contain, as I have said, all the essential features of the contract, and it must appear from the writings themselves or from other written memoranda therein referred to, who were the vendor and vendee, either in specific terms or in language so referring to the different parties that they can be identified.

The only particular in which it is claimed that the written contract was signed by the defendant is defective, is that it does not appear from the contract or from any written or printed memoranda therein referred to, who was the vendee of the property purchased by defendant upon the contract now presented to you in the name of A. R. Walker, who was the auctioneer and who at the time of the sale, in law, the agent
262 of both parties. Subsequently to the sale he ceased to be the agent of the defendant, but he still continued to be the agent of the seller. He could not, after the sale and execution of the paper by defendant affix his name to the contract so as to bind the defendant, but it was competent for him to affix his name so as to bind the seller and thereby indicate in writing who the seller was.

If you find that prior to the commencement of this suit M'r Walker wrote his name upon this paper as the agent of the seller, and that when this suit was commenced the contract bore upon it in addition to the name of the defendant, which was affixed to the instrument at the time of sale, the name of M'r Walker as agent for the seller, then it is competent for the plaintiff to prove by parol evidence for whom the
263 auctioneer acted as agent, and if you find that he acted as agent of the plaintiff, and that the plaintiff was the person for whom the auctioneer was agent in this auction sale, and who is the vendor, then the requirements are sufficiently complied with. Or if you find that the persons for whom the auctioneer acted were Cummings and Weeks, then this suit having been brought in the name of Cummings alone, and the objection in regard to the non joinder of plaintiffs, the non-joinder of Weeks as administrator, and his wife, not having been taken by answer in accordance with the rules of practice and pleading or code of this State, such non-joinder cannot now be taken advantage of by this defendant, and you may treat the action as if it was properly brought
264 The defendant then and there duly excepted to the charge or proposition of the court that the objection to the non-joinder of Weeks' administrator as a party plaintiff, not having been taken by defendant's answer, Cummings properly brought the action as sole plaintiff.

If, on the other hand, you find that the name of Walker was not attached to the paper until after the commencement of this suit, which was instituted prior to April, 1872, then, as matter of law, the names of the vendor or the vendors do not appear, either expressly or by im-

plication, in the written contract, or in any of the memoranda attached thereto; and in that event, if you so find, the contract is fataly defective.

The evidence in regard to this is contained in the deposition of M'r Minot. The counsel for the defendant claim that the deposition
265 of M'r Minot shows that in May, 1872, after this suit was brought, he examined the contract now before you, and that on that day it did not contain either upon front or back the name of M'r Walker. The counsel for the plaintiff contend that an examination of that deposition shows that the defendant is mistaken in the construction which he places upon it and that M'r Minot simply intends to testify that on the 26th of May, 1871, when this contract was broken, as he alleges, it did not contain the name of A. R. Walker, but does not swear that he made any subsequent examination after the 26th day of May, 1871.

But according to my view of the law upon this question in regard to the validity of the contract, it turns upon the fact whether you find that Walker put his name there before the commencement of the suit,
266 or whether you find that he put his name there after the commencement of the suit.

(The defendant's counsel also, then and there, duly excepted to the proposition or charge of the court, that the validity of the contract depended on whether the auctioneer signed it before or after suit brought, and leaving the jury to determine that point.)

If he did not put his name there until after the commencement of the suit, then I think that the technical objection can be taken that the name of the vendor does not appear.

On May 26, 1871, three deeds of the Glen House property and furniture had been executed, one by M'r Cummings, one by M'r Weeks, as administrator, and one by the widow of M'r Thompson, and these three deeds were on that day tendered by M'r Cummings to the defendant. This 26th day of May was the day on which these deeds were to
267 be tendered and the contract was to be executed. These deeds defendant refused to accept, on the ground that they were not in compliance with the terms of the written contract.

The next question for you to determine is whether he was justified in so refusing to accept, and whether there was a fulfillment of the contract by the plaintiff and a breach of it by defendant. His refusal was based upon these grounds: first, "because of the conditions inserted in the papers tendered, which are not in accordance with the terms stated at the sale;" second, "because of the mortgages now on the estate," and third, "because the title is otherwise not satisfactory."

As to the third objection, the three deeds which were tendered convey a perfect title to the defendant, subject to the mortgages which
268 were then outstanding upon the property. In my opinion the deeds from M'r Cummings, Weeks, and the widow would have, if accepted, vested in Capt'n Grafton a perfect title to this property, subject only to the mortgages which were outstanding.

In regard to the mortgages it is not denied that there were mortgages outstanding on the land. They are specified in the deeds, and the plaintiffs says the existence of these mortgages was recognized in the written terms of sale, which specified that the land was subject to incumberances of about $51,000, and that the difference between the amount of the mortgages and the cash payment of $20,000 was to be satisfactorily secured, thus indicating that the amount of the mortgages was to be deducted from the purchase price of $90,000.

269 By the written contract which was signed by defendant he

agreed to comply with the terms of sale as declared by the auctioneer at the time and place of sale, meaning, of course, the written terms so declared.

The principal point upon which evidence has been submitted to you is, whether two written papers or but one written paper was read by the auctioneer at the time of the sale. It is contended by the defendant that but one written paper, that one that is annexed to the contract which he signed, was read. It is contended by the plaintiff that the two written memoranda produced upon the trial were read at that time by the auctioneer. The question is not whether the auctioneer announced verbally any condition not contained in any writing, but whether
270 the two written memoranda were at the time and place of sale announced by the auctioneer. It is not necessary, as I have said, that the entire terms should be specified upon one paper. The defendant agreed to comply with the written terms as announced at the sale.

If you find that the paper called "Exhibit F" was at that time read by the auctioneer as a part of the terms of sale, then, in my opinion, the deeds tendered are not objectionable, so far forth as they convey a title subject to the mortgages.

(The defendant's counsel also, then and there, duly excepted to the proposition or charge of the court that if Exhibit F, No. 6, was read at the sale and part of the terms of the sale, the deeds tendered are not objectionable so far as they convey title subject to the mortgages.)

If the existence of these mortgages was specified in the terms
271 of sale, and in substance, the agreement of purchase may be considered as subject to them. If the paper F, No. 6, was not read at the time of the sale, then the contract on the part of the vendor was to vest in the purchaser an unincumbered title, and the existence of these mortgages is a blemish on the title and the defendant was not bound to accept them, unless subsequent to the sale he agreed with the seller or his agent to waive fulfilment of that provision of the contract and to accept deeds subject to the mortgages.

The action is brought upon the original written contract. The defendant by one of his pleas denies that the contract was complied with in the provision requiring an unincumbered title.

The plaintiff replies that at the instance of the defendant the compliance with that portion of the contract had been waived and
272 that at his request deeds were executed subject to the mortgages which he agreed to accept. This reply to the objection that deeds which were called for by the contract were not tendered it is competent for the plaintiff to make, and, if in fact true, is a sufficint excuse for non-performance of the contract in this regard, although the waiver on the part of the defendant was by parol.

(The counsel for the defendant also, then and there, duly excepted to the proposition or charge of the court that a subsequent waiver of one of the conditions of sale could be by parol.

The counsel for the defendant also, then and there, duly excepted to the proposition or charge of the court that if the defendant had by parol, subsequently to the sale, waived compliance with the contract, such
273 a subsequent waiver by the defendant was a sufficient excuse for non-performance.)

Upon this point the evidence is of M'r Weeks and of M'r Heywood, the lawyer. I will read two sentences from the testimony of M'r Heywood. Prior to the sale there had been a great deal of talk about mortgages. The result of the discussion was that the purchaser could take subject to the mortgages, or Cummings pay off the mortgages. "I asked

them after the sale (that is, Grafton and Judge Davis) which way they would have the deeds. Davis said he could control the mortgages, and it would be more satisfactory to take subject to the mortgages. I asked about the deeds, whether a deed from Cummings and the widow and the administrator would be satisfactory." M'r Weeks also testifies somewhat upon that point.

274 The point I have just been commenting upon in regard to the waiver is not the insertion of a new element in the contract by parol, but it is after the contract has been made and reduced to writing, whether it is permitted to a party, or is not competent for a party, for the defendant, the contracting party, to say that he did not waive by parol a compliance with one of the terms of the contract. For example, a written contract is made by which the deeds are to be given in ten days, and if not given in ten days the sale is at an end. The defendant, the purchaser, can say to the vendor, "Why, ten days is pretty short, & you may have twenty." Then the vendor, at the end of twenty days, tenders those deeds. The purchaser says, "The written contract requires you to give a deed at the expiration of ten days." The
275 vendor may then reply, "You waived that provision of the contract, and extended the time." That is an illustration of the point I have been submitting.

The next objection is that by the terms of the written contract the sale was subject to the conditions of the sale of the stages, &c., which are that the proprietor of the road shall have the exclusive business of the house, and that the deeds specify that the sale was subject to the conditions of sale of the stages and mountain road, which were that the proprietor should have the exclusive stage, livery, and horse business of the house. The deed must be in compliance with the terms of sale. It is not permitted to the plaintiff to insert a condition not provided by the terms of sale. It is claimed that the insertion of the words
276 "must be allowed the livery and horse business of the house" is at variance of the terms of sale, which do not specify "livery and horse," but say "exclusive business of the house." On the other hand it is said that it is the same thing, or if there is any difference at all it is of an unsubstantial and unimportant character. In regard to that what I have to say is, that it is necessary that the deeds should substantially and in effect comply with the terms of sale. If the deeds substantially vary from the terms of sale, the defendant is not bound to accept them, but whether they do vary in this regard, whether the insertion of "livery and horse" is a substantial variance with the term of sale, it is for you to say.

If the defendant was not justified in refusing to accept the
277 deeds as tendered, then he became liable to the plaintiff for damages. The amount of damages it is for you to affix.

The rule of damages upon a breach of contract for purchase of real estate is the difference between the contract price and the saleable value of the land at the time of the breach and the expense of the second sale, if second sale there be.

(The defendant also then and there duly excepted to the proposition or charge of the court that the expense of the second sale is an element in the rule of damages.)

A vendor who has contracted to sell his land may keep his land if he chooses and bring his action. He is not obliged to sell the land, or he may sell it. The plaintiff is not obliged to keep his land; it is perfectly proper for him to sell. When the purchaser fails to com-
278 ply with his contract for the purchase of real estate, and the ven-

dor retains his land and sues for damages, the difference between the contract price and the saleable value is proved by the testimony of those witnesses who have knowledge on the subject when the land has been sold at a fair sale. The price which the land brought becomes a fact in the case to be considered by the jury, and if the sale was a fair one, and all proper measures taken to secure as favorable a price as possible, it becomes a very important fact. It then becomes an actual and not a theoretical test of the saleable value. If no other evidence of the saleable value is put in except that derived from a fair sale, the result of the sale would be a measure of damages. Where other evidence of the saleable value is introduced, the jury are to take all
279 the evidence into consideration. But when there is a fair sale, that should be a consideration of very great value, because that is an actual test; and where an agent of the purchaser is present to bid at the second sale, assuming that the conditions of the second sale are the same as the first, and the agent of the original purchaser bids all that he chooses to bid, and it is struck off to somebody else, and the sale is in other respects a fair one, why, you are to look at the sale with very great consideration.

It is said that the second sale was made by the plaintiff as the agent of the defendant, and that plaintiff entered into a private arrangement with the purchaser, Milliken, wherein plaintiff in the event of the purchase by Milliken was to become jointly interested with him, and that such private arrangement rendered the second sale void and de-
280 stroys its value as an evidence of the damages to which the plaintiff was subject. Now, when the sale is made by an agent, or a trustee of the property, the person for whom the trustee or agent acts cannot be both buyer and seller, and if a private arrangement is made by which the agent becomes interested in the purchase, such sale, whether it is made at auction or whether it is made on private terms, is voidable at the option of the principal. It is what is called in law constructively fraudulent. But that principle does not apply here in the rigid way in which it is considered applicable to sales by agents.

Plaintiff was not, strictly speaking, an agent for defendant, although the sale was a sale on defendant's account.

(The defendant's counsel also then and there duly excepted to
281 the proposition or charge of the court to the effect that the principle, that when a private arrangement with a third party, an agent or trustee becomes interested in the purchase, such sale, whether it is made at auction or made on private terms, is voidable on the option of the principal, does not apply in this case.)

The title had not passed to defendant, and the object and effect of the sale, that is, the object and effect of the sale as far as we are concerned, is to see what the damages were, and what the fair market value of the property was. If the sale was in fact unfair, and the parties in interest did not use all proper means to make it productive, then you are to disregard it and make proper deductions from the loss
282 sustained by plaintiff in your estimate of damages. And if they in point of fact did all they could, and if, in point of fact, this arrangement with the Millikens enhanced the price which the property brought, then the price which the property brought is to be considered by you and it is to be taken by you as an element of importance.

(The counsel for the defendant also then and there duly excepted to the proposition or charge of the court, that if in point of fact the parties in interest at the sale did all they could, and the arrangement with the Millikens enhanced the price which the property brought, the price

obtained is to be considered and taken by the jury as an element of importance.)

On the question of damages, you are to take into consideration the circumstances that have been adverted to by the plaintiff's
283 witnesses, to wit, that the second sale was after the preparation of mountain hotels had been already commenced, and that people, probably, completed their arrangements, and that after the first sale and prior to the second sale there was a depreciation in the value of this property, which has not a firm and enduring value like the articles of personal property that are sold here in the market, but which has a fluctuating value, and the market value of the property does not depend by any means upon the amount of money that has been expended upon it, that is, the amount of money that it costs, but the market value depends upon the number of people who want to buy it and the time at which it is sold, and all the circumstances which enter into the consideration, and make a demand for property of that
284 peculiar character. Those are circumstances which it is fair for you to take into consideration. On the other hand counsel for the defendant says that it was worth just as much in June as it was in May; that there was no depreciation, that the saleable value had not varied, and that the sale was an unfair one and no criterion. Take all those facts together with consideration and you are to weigh them and determine what the damages were. Add to the actual damages in regard to the saleable value the amount of the expenses of the second sale, which were somewhere in the neighborhood of $700, and to that add interest to the date of the judgment.

(The defendant then and there absolutely excepted to the pro-
285 position or charge of the court directing the jury to "add to the actual damages in regard to the saleable value the amount of the expenses of the second sale," &c.)

And thereupon the jury retired and brought in a verdict in favor of the plaintiff for $15,000, with interest from the delivery of the deeds, being $3,659.43, and amounting in all to $18,659$\frac{43}{100}$.

And because none of the said exceptions so offered and made to the rulings and opinions and decisions of the said presiding judge do appear upon the record of the said trial, therefore, on the prayer of the said defendant, the same are hereby stated, settled, and allowed as of the term when said cause was tried, to wit, the October term, A. D. 1874.

Witness my hand and seal this 30th day of August, A. D. 1876, as of the term aforesaid.

N. SHIPMAN, *Judge.* [L. S.]

286 (Endorsed:) U. S. circuit court. Stephen H. Cummings, pl'ff, ag'st Joseph Grafton, def't. Bill of exceptions. Platt & Gerard, att'ys for def't, 45 William st. Filed Sept. 1st, 1876.

287 *Assignment of errors and prayer for reversal.*

United States circuit court in the southern district of New York, in the second circuit.

STEPHEN H. CUMMINGS
vs.
JOSEPH GRAFTON.

288 Afterwards comes the said Joseph Grafton, by Platt & Gerard, his attorneys, and says that in the record and proceedings aforesaid,

dor retains his land and sues for damages, the difference between the contract price and the saleable value is proved by the testimony of those witnesses who have knowledge on the subject when the land has been sold at a fair sale. The price which the land brought becomes a fact in the case to be considered by the jury, and if the sale was a fair one, and all proper measures taken to secure as favorable a price as possible, it becomes a very important fact. It then becomes an actual and not a theoretical test of the saleable value. If no other evidence of the saleable value is put in except that derived from a fair sale, the result of the sale would be a measure of damages. Where other evidence of the saleable value is introduced, the jury are to take all
279 the evidence into consideration. But when there is a fair sale, that should be a consideration of very great value, because that is an actual test; and where an agent of the purchaser is present to bid at the second sale, assuming that the conditions of the second sale are the same as the first, and the agent of the original purchaser bids all that he chooses to bid, and it is struck off to somebody else, and the sale is in other respects a fair one, why, you are to look at the sale with very great consideration.

It is said that the second sale was made by the plaintiff as the agent of the defendant, and that plaintiff entered into a private arrangement with the purchaser, Milliken, wherein plaintiff in the event of the purchase by Milliken was to become jointly interested with him, and that such private arrangement rendered the second sale void and de-
280 stroys its value as an evidence of the damages to which the plaintiff was subject. Now, when the sale is made by an agent, or a trustee of the property, the person for whom the trustee or agent acts cannot be both buyer and seller, and if a private arrangement is made by which the agent becomes interested in the purchase, such sale, whether it is made at auction or whether it is made on private terms, is voidable at the option of the principal. It is what is called in law constructively fraudulent. But that principle does not apply here in the rigid way in which it is considered applicable to sales by agents.

Plaintiff was not, strictly speaking, an agent for defendant, although the sale was a sale on defendant's account.

(The defendant's counsel also then and there duly excepted to
281 the proposition or charge of the court to the effect that the principle, that when a private arrangement with a third party, an agent or trustee becomes interested in the purchase, such sale, whether it is made at auction or made on private terms, is voidable on the option of the principal, does not apply in this case.)

The title had not passed to defendant, and the object and effect of the sale, that is, the object and effect of the sale as far as we are concerned, is to see what the damages were, and what the fair market value of the property was. If the sale was in fact unfair, and the parties in interest did not use all proper means to make it productive, then you are to disregard it and make proper deductions from the loss
282 sustained by plaintiff in your estimate of damages. And if they in point of fact did all they could, and if, in point of fact, this arrangement with the Millikens enhanced the price which the property brought, then the price which the property brought is to be considered by you and it is to be taken by you as an element of importance.

(The counsel for the defendant also then and there duly excepted to the proposition or charge of the court, that if in point of fact the parties in interest at the sale did all they could, and the arrangement with the Millikens enhanced the price which the property brought, the price

obtained is to be considered and taken by the jury as an element of importance.)

On the question of damages, you are to take into consideration the circumstances that have been adverted to by the plaintiff's
283 witnesses, to wit, that the second sale was after the preparation of mountain hotels had been already commenced, and that people, probably, completed their arrangements, and that after the first sale and prior to the second sale there was a depreciation in the value of this property, which has not a firm and enduring value like the articles of personal property that are sold here in the market, but which has a fluctuating value, and the market value of the property does not depend by any means upon the amount of money that has been expended upon it, that is, the amount of money that it costs, but the market value depends upon the number of people who want to buy it and the time at which it is sold, and all the circumstances which enter into the consideration, and make a demand for property of that
284 peculiar character. Those are circumstances which it is fair for you to take into consideration. On the other hand counsel for the defendant says that it was worth just as much in June as it was in May; that there was no depreciation, that the saleable value had not varied, and that the sale was an unfair one and no criterion. Take all those facts together with consideration and you are to weigh them and determine what the damages were. Add to the actual damages in regard to the saleable value the amount of the expenses of the second sale, which were somewhere in the neighborhood of $700, and to that add interest to the date of the judgment.

(The defendant then and there absolutely excepted to the pro-
285 position or charge of the court directing the jury to "add to the actual damages in regard to the saleable value the amount of the expenses of the second sale," &c.)

And thereupon the jury retired and brought in a verdict in favor of the plaintiff for $15,000, with interest from the delivery of the deeds, being $3,659.43, and amounting in all to $18,659$\frac{43}{60}$.

And because none of the said exceptions so offered and made to the rulings and opinions and decisions of the said presiding judge do appear upon the record of the said trial, therefore, on the prayer of the said defendant, the same are hereby stated, settled, and allowed as of the term when said cause was tried, to wit, the October term, A. D. 1874.

Witness my hand and seal this 30th day of August, A. D. 1876, as of the term aforesaid.

N. SHIPMAN, *Judge.* [L. S.]

286 (Endorsed:) U. S. circuit court. Stephen H. Cummings, pl'ff, ag'st Joseph Grafton, def't. Bill of exceptions. Platt & Gerard, att'ys for def't, 45 William st. Filed Sept. 1st, 1876.

287 *Assignment of errors and prayer for reversal.*

United States circuit court in the southern district of New York, in the second circuit.

STEPHEN H. CUMMINGS
vs.
JOSEPH GRAFTON.

288 Afterwards comes the said Joseph Grafton, by Platt & Gerard, his attorneys, and says that in the record and proceedings aforesaid,

and also in the giving of judgment aforesaid, there is manifest error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant, Joseph Grafton, that the same was irrelevant and immaterial, a general statute of New Hampshire, being sections 3, 4, 5, and 6 of chapter 106 of the Revised Statutes of New Hampshire.

And that there is error in this, that the said circuit court admitted in evidence to the jury contrary to the objection of the said defendant that the same was irrelevant and incompetent, on the ground that previous conversations could not affect or impair or modify the written agreement, the evidence of the plaintiff of the conversation which occurred on the day prior to the sale with the defendant in reference to the sale, in the course of which conversation defendant asked plaintiff about the amount of mortgages upon the property, and that plaintiff told him, as near as he could at the time, what amount was held by plaintiff's
289 father, what amount by M'r Weston, and what amount by M'r Jones ,amounting in all to about fifty-one thousand dollars; that the defendant then asked him about the amount of the debts against the estate; that he told him as near as he could about the partnership and personal debts of S. M. Thompson; that he told him the encumbrances were somewhere about one hundred thousand dollars.

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant to the same, upon the ground that it was not proven to have been done at the time of the sale, nor the time when it was written, and that it had no connection with the transaction, and also that it was wholly irrelevant and immaterial, the endorsement upon the paper as follows: "A. R. Walker, auctioneer and agent for both parties."

And that there is error in this, that the said circuit court admitted in evidence to the jury the paper writing marked "Plaintiff's Exhibit F No. 6," contrary to the objection of the defendant, on the ground that the written contract also read in evidence specifies the terms and
290 conditions of sale, and also that there is no connection shown on the face of the papers between the paper now offered to be read and the paper so signed by the defendant, and that it was irrelevant, immaterial, and incompetent. The paper writing is as follows: "There are mortgages on the property amounting to about fifty-one thousand dollars. Any amount not already secured by mortgage after the payment of the twenty thousand dollars must be made secure to the satisfaction of the seller. The house to be kept open as heretofore."

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant to the same, that it was incompetent, and on the ground that the written agreement must control, and could not be modified by the parol statement not embraced in the writing subsequently signed, and that said statement of the auctioneer was irrelevant, the following testimony:

"Question. What did he say?

"Answer. He explained what was meant in regard to the condition of the sale of the staging, that the purchaser of the property had
291 the privilege of buying the staging at an appraisal of three disinterested parties, or if he did not, then the house had agreed or would agree to give the staging business of the house."

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant on the ground, that the written contract provided how the payments were to be made, and on the ground that the evidence was incompetent, the

question to be put to the witness, "Did the auctioneer say anything about these encumbrances on the right of the purchaser to take subject to the mortgages?" and the answer thereto, "Yes, sir; he said this could be arranged; he said they could be continued—could be arranged to continue—if the purchaser did not want to take them up immediately. That was the understanding, as far as I can state it, in his words. That is what he meant to convey."

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objections of the defendant on the ground, that the written contract provided how the payments were to be made, and on the ground that the evidence was incompe-
292 tent, the question to be put to the witness then under examination, as follows: "If the purchaser did want to take them up?" and the answer of the witness thereto, "Yes, sir."

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that the same was irrelevant and incompetent, the question to be put to the witness then testifying, as follows: "What was the message?" and the answer thereto, as follows: "I sent word and requested my father to ask the defendant if the man that I had to work there in the garden, getting ready the vegetable-garden of the house, and the other hands about the place, whether I should let them go on with the work or whether they should stop until we took possession."

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant, on the ground that the same was immaterial and irrelevant, and that the subsequent sale was not competent evidence as against the defendant, copy of the notice, as follows:

293 POSITIVE SALE OF THE GLEN HOUSE.—VALUABLE HOTEL PROPERTY AT AUCTION, SITUATED AT THE FOOT OF MOUNT WASHINGTON.

On Friday, June 9, 1871, at 12 o'clock noon, at the Alpine House, in Gorham, New Hampshire, on account of Joseph Grafton, will be sold the above hotel property, together with the furniture belonging to it, situated in Green's grant, in the State of New Hampshire, it being the same property sold at the Alpine House, in Gorham, N. H., on Tuesday, May 16, 1871, at 11 o'clock a. m., by order of J. W. Weeks, administrator of the estate of the late J. M. Thompson and Stephen H. Cummings, surviving partner of said Thompson, said Joseph Grafton having failed to comply with the terms and conditions of the sale. The property will be sold on his account to the highest bidder, on Friday, June 9th, 1871, at the Alpine House, in Gorham, N. H., at 12 o'clock noon. $5,000 will be required of the purchaser at the time and place of sale.

STEPHEN H. CUMMINGS,
Surviving Partner.
JA'S M. WEEKS,
Administrator of the Estate of J. M. Thompson.

And that there is error in this, that the said circuit court ad-
294 mitted in evidence to the jury, contrary to the objection of the defendant, on the ground that the defendant was in nowise connected therewith and no party thereto, and that the price for which the property then sold was not competent on the question of damages in this action, and that it was irrelevant, immaterial, and incompetent, and

not evidence as against defendant, a paper purporting to be a memorandum of the sale, with an endorsement upon it signed by the purchaser at the second sale, as follows:

GORHAM, N. H., *June* 9, 1871.

We, the subscribers, do hereby acknowledge ourselves to be the purchasers of the estate known as the Glen House, in Green's grant, New Hampshire, and sold at auction on Friday, June 9th, 1871, with the furniture belonging to it, at 12 o'clock noon, and for the sum of sixty-one thousand dollars, said property being more particularly described in the advertisement hereunto affixed; and we hereby bind ourselves, our heirs and assigns, to comply with the following terms and conditions of the sale, as declared by the auctioneer at the time and place of sale, and at the sale May 16th, 1871.

295 C. T. MILLIKEN.
S. H. CUMMINGS.

[5 c. stamp.]

Terms and conditions of sale.

Ten days will be allowed to examine the title, within which time the property must be settled for at the office of the auctioneer. Five thousand dollars will be required of the purchaser on the spot, which will be forfeited to the sellers if the terms and conditions are not complied with, but the forfeiture of said money does not release the purchaser from his obligation to take the property. Fifteen thousand dollars must be paid on the delivery of the deed, and one-half of the balance of the purchase-money to be paid Sept. 1st, 1871, the remaining balance to be paid Sept. 1st, 1872. There are mortgages on the property amounting to about fifty-one thousand dollars, and any amount (not already secured by mortgages), after the payment of the twenty thousand dollars, must be made secure to the satisfaction of the sellers.

The property is sold subject to the conditions of the sale of the stage and mountain route, &c., which are that the proprietors of the route shall have the exclusive stage and mountain business of the house,
296 and that the house shall be kept open as heretofore.

(On the back:)

GORHAM, N. H., *June* 9, 1871.

We, the undersigned, assent to the within.

JA'S W. WEEKS,
Administrator.
STEPHEN H. CUMMINGS.

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant, on the ground that it was irrelevant and incompetent, and that M'r Minot did not appear to have been the agent of the defendant, the question "Did you have any conversation with M'r Minot about that sale, or hear him make any statement in reference to it other than what you have said at this second sale?" and the answer thereto, as follows: "M'r Walker, the auctioneer, in my presence, also asked M'r Minot a question in regard to what the property brought—if it brought more on that sale than the first, who the difference belonged to; and he stated it belonged to M'r Grafton. M'r Minot also said that he objected to the sale or forbid the sale; he said that at the time the auctioneer was about commencing the sale, and outside in the presence of all."

297 And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that the same was irrelevant, immaterial, and incompetent, and that no connection between M'r Minot and defendant as to the second sale had been shown, and that there was no evidence of any authority to act as agent of defendant or to represent him at the second sale, the question "What did M'r Minot bid?" and the answer thereto, "M'r Minot started it at $52,000; I think that was the first bid; and then there was a young gentleman that came up with M'r Minot who I understand was a clerk in M'r Minot's office. He made another bid, and then M'r Minot again, and so on until it ran to something like $60,000. M'r Milliken bid, but not until after they got up to something over $55,000. The last bid M'r Minot made was $60,000, and M'r Milliken bid $61,000. It was knocked down to M'r Milliken. It was afterwards conveyed to M'r Milliken; and he is the present proprietor." And that there is error in this: That the said circuit court admitted in evidence to the jury,

298 contrary to the objection of the defendant that it had not been shown that the witness was competent to speak of the value of land of that character, testimony of said witness to the following question: "Give an estimate of what was the value of wild land in that vicinity? Answer. That this piece of property, of about eight hundred acres or more, sold for about ten thousand dollars; that it was more valuable as a hotel site than anything else. I really don't know what land about there is worth; the land is worth about what the stumpage was worth. It depends upon how much timber there is upon it."

And that there is error in this, that the said circuit court allowed the witness to read from the paper to the jury, contrary to the objection of the defendant on the ground that the paper writing was not evidence against the defendant, and that the same was irrelevant, immaterial, and incompetent, the following paper, viz:

BOSTON, *May* 24, 1871, *Wednesday.*

Was present during a conversation at 48 Winter street, between Mess'rs Joseph Grafton and A. R. Walker, in reference to purchase of Glen House by M'r Grafton, at auction on the 16th instant. M'r

299 Grafton stated that he had bid off the property at the suggestion of Judge Davis, who told him that certain parties, creditors, in Portland, whom he represented, would join him in the purchase for the mutual protection of M'r Grafton and themselves. Mr. Grafton also said that he was much surprised on receiving a letter from Judge Davis, after his return to New York, stating that the parties referred to declined having anything to do with the property. He further stated that he would rather lose the amount of his claim than have $90,000 worth of property on his hands.

M'r Joseph Grafton, purchaser of Glen House, called M'r Walker, handed him the deeds of the property executed, upon which M'r Grafton remarked that he wished to show them to his attorney; an appointment was then made for a meeting in half an hour at M'r Minot's office, Court street, M'r Walker to take deeds with him.

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that the previous statements were merged in the written agreement signed by defendant, and the conversation was irrelevant and immaterial,

300 the question "Was anything more said about the encumbrances and the fifty-one thousand dollars of mortgages than what you have stated?" and the answer thereto, as follows: "Not before the sale, I think.

I think I stated the arrangement of mortgages; a part of them, about $28,000, stood against J. M. Thompson & Co. and Nathan Cummings, and the balance against J. M. Thompson, and about $16,000, more or less, of J. M. Thompson's debts were unsecured."

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that there was no evidence that M'r Minot was agent for defendant at the time of the second sale, or had any authority to represent him or to act for him thereat, and that the same was irrelevant, immaterial, and incompetent, the testimony that M'r Minot was present at the second sale; and saw M'r Minot and a young man by the name of Jackson there, and had some conversation. Just before the sale he, Minot, suggested to Walker to make the terms of sale precisely the same as they were on the first sale, which I think he did. I so understood it according to my recollection. M'r Minot, when the matter was called up, forbid the sale
301 in a loud voice, so as to be heard by those present, and stated that in the first sale it was not stated that the house was to be kept open as theretofore; that that was a new clause, and was not contained in the declaration of the auctioneer at the first sale.

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that M'r Minot's statements were not competent to prove any agency for or authority to represent or to bind the defendant, and that they were irrelevant, immaterial, and incompetent, the question "What did M'r Minot say to you in reference to his acting for Captain Grafton?" and the answer thereto, "He said that the objection M'r Grafton had to taking the property was that the house property had the exclusive benefit of the house, and that was an encumbrance on the property."

And that there is error in, this that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that the same was irrelevant, immaterial, and incompetent, and what was then said did not form any part of the contract, the following
302 question to the witness, Heywood, as to conversation between defendant, the witness, M'r Weeks, and Judge Davis after the signing of the second memorandum by defendant, "State what was said?" and the answer thereto: "Prior to the auction sale there had been a good deal of talk in the presence of M'r Grafton and with him between M'r Grafton and M'r Weeks and myself as to the amount of mortgage on the property and the amount was known, except one mortgage, the one that was then held by the Casko Bank, of Portland. That was ascertained from the older M'r Cummings, who was present, and the amount of mortgages was determined to be about $51,000. There was some talk whether the property should be sold subject to the mortgages or not."

And that there was error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that the conversation asked for did not form any part of the contract, the answer to the following question, "State what that conversation was?" the answer being limited by the presiding judge to allowing the witness to state the result of the discussion about the mortgages, and also whether in pursuance of that result it was embodied in the paper Exhibit F, No. 6.

303 And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that it did not appear by whom it was said, or to whom, and

that it could not control, affect, or impair the terms of the sale subscribed by the defendant, and that it was irrelevant and immaterial, the question to be put to witness, "What, if anything, was said about the house being kept open?" and the answer thereto, as follows: "That was one of the terms of the sale, that the house should be kept open as usual, because John Lindsey had bought or had the refusal of the staging of the house. This was said by the auctioneer when it was told. It was stated by the auctioneer at the time of the sale that the purchaser of the real estate had the right to take the staging at the appraisal of men if it was not run to the satisfaction of the purchaser of the house."

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that the same was irrelevant, immaterial, and incompetent, and not limited to the time of the alleged breach of the agreement by the defend-
304 ant, the question, "What effect, if any, would the later period in the season of the year at which the second sale occurred have upon the value of real estate and furniture?" and the answer thereto, "It would have considerable effect, because the house ought to be cleaned up and put in order so as to have the house open in the middle of June; that he could not tell the difference in dollars and cents; that the value would be diminished by the sale being later."

And that there is error in this, that said circuit court admitted in evidence to the jury, contrary to the objection by defendant that the written contract subscribed by the defendant must control as to the terms of the sale, and could not be varied by the testimony offered, and that the same was irrelevant, immaterial, and incompetent, the question to be put to the witness, "Whether or not the encumbrances of mortgages existing on the property was mentioned in any way by the auctioneer?" and the answer thereto that "He thinks that the amount was stated, and that it was stated it would be about $50,000; that he could not say whether anything was said by the auctioneer about the house being kept open, but he thinks the right was reserved to the purchaser of the
305 real estate to take the staging property when it was not run to suit the proprietor of the house; that this declaration was made by the auctioneer at the time the property was put up for sale."

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that the question and testimony was irrelevant, immaterial, and incompetent, and that the charges made by the auctioneer were not competent to be considered by the jury as an element of damage, the following question and answer. "Question. Do you know what the auctioneer, Walker, charged as commission for services in selling the property?" "Answer. He charged one per cent."

And that there is error in this, that the court refused to strike out the evidence of the witness Weeks as to the amount of commissions charged by the auctioneer, upon the ground that the witness had no knowledge as to the sum paid to the auctioneer, and that the mere fact that he allowed in the settlement of accounts between himself and plaintiff was no evidence of payment on which defendant could be charged, and the evidence was irrelevant, immaterial, and incompetent.

306 And that there was error in this, that the said circuit court admitted in evidence, contrary to the objection of the defendant that the question and evidence was irrelevant and immaterial to any issue in this action, and that it was not competent to show in this manner the damage claimed in this action:

"Question. Can you state what made the difference in the price re

ceived for the same property on the 16th of May and on the second sale on or about the 9th of June?

"Answer. There was a good many objections why people would not bid on the sale in June. There were a good many repairs to be made, and the house could not be got ready as it should have been in time for the business of that season. There was not time to get the requisite number of servants and help to run it. It takes over a hundred persons to do the business of the house."

And that there is error in this, that the said circuit court admitted in evidence to the jury, contrary to the objection of the defendant that the question and testimony was irrelevant, immaterial, and incompetent, as follows:

"Q. Do you recollect your son (plaintiff) asking you to take a message to Captain Grafton?

307 "A. I think the same day of the sale I went up to the Glen House, and M'r Cummings told me he had to go to another place—to the sale of the Jackson farm, I think—and should not go down. When I went down I delivered a message to M'r Grafton. I told him that Cummings had a large number of men employed, at a very considerable expense, and he wished to know whether they should continue the employment or dismiss them. Captain Grafton referred me to M'r Woodbury Davis. I went to him and said that I was referred to him by M'r Grafton, and I think I told him what I was referred to him about, and gave him the message, and he said that he was going to the Glen House himself."

And that there is an error in this, that the said circuit court admitted to be read in evidence to the jury, contrary to the objection of the defendant that the same was immaterial and that the statements therein contained were not shown to have been authorized by or sanctioned by the defendant, the following letter:

DEAR SIR: I came up to-day hoping to confer with you in re-

308 gard to the purchase of the Glen House. I don't know but that Lindsay and Barron intend to take it. Something they said indicated as much, and Grafton offered to let them take it at his bid, and let them have their own time to pay him his claim. But I find M'r's Thompson is strongly attached to the place. The judge of probate will make her an allowance. It occurred to me that the purchase might be made in this way: One-tenth would be $9,000:

S. H. Cummings,	$\frac{3}{10}$	27,000
Lindsay,	$\frac{3}{10}$	27,000
Barron,	$\frac{3}{11}$	27,000
M'r's Thompson,	$\frac{1}{10}$	9,000
		90,000

This would relieve you from most of the care. It would give M'r's Thompson an interest in it. The $9,000 due Grafton is as much as her share, and I will agree to let it be until she has time to pay it from the profits. I go home to-morrow, but I wanted to propose this to you, as Grafton really don't want anything to do with the property, though he thinks Stevens, or some one of their leading hotel men, may have some young man that they would like to put into the house. He will try to dispose of it in that way, but hopes that before doing it I shall

309 be able to write to him that it will be taken up here.

Very truly, yours,

WOODBURY DAVIS.

S. H. CUMMINGS, Esq.

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"1st. No contract was made for the sale and purchase of real estate between the plaintiff and defendant."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"3rd. If the sale was made on the part of the plaintiff and Weeks, the administrator, this action cannot be maintained by Cummings alone, and the defendant is entitled to a verdict."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by
310 the counsel for the defendant, as follows:

"4. The administrator, Weeks, not being a party plaintiff to this action it cannot be maintained."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"5. Under the evidence in this action the only agreement on the part of the defendant which the jury can consider, if any, is Exhibit E, which was subscribed by the defendant."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"6. The paper, Exhibit F, did not form any part of the contract between the parties, and cannot be regarded or considered by the jury."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"8. Under the evidence the real estate in question did not belong to the copartnership of J. M. Thompson & Co., and the plaintiff was
311 not authorized to make a sale thereof, and a conveyance thereof, in his character as surviving partner."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"9. The deed tendered as executed by the administrator did not confer or grant any title to the real estate."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"10th. Weeks, the administrator, was required by his license to make a sale at public auction. He could not adopt as his own a sale at auction made by another party having and representing in said sale a distinct interest in the property."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"11th. The administrator, Weeks, could only sell the property in the manner prescribed and according to the terms prescribed in his license."

312 And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"12th. The license did not authorize the administrator to make the sale or execute the conveyance mentioned in the evidence in this suit."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested, as follows:

"13th. The plaintiff, Cummings, in making the second sale, being interested in the purchase, and he subscribing the agreement as purchaser, thereby destroyed any claim he might otherwise have had against the defendant."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"14. If a valid sale has been proven on behalf of the plaintiff, and a breach shown by the defendant, there cannot in any view of the evidence be a recovery of more than nominal damages."

And that there is error in this, that the said circuit court did refuse to instruct and charge the jury, as then and there requested by the counsel for the defendant, as follows:

313 "15th. Under the sale the defendant was entitled to a deed, free and clear of all incumbrances and subject only to the condition specified in Exhibit E, as to the staging."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"16th. By the terms of the sale the defendant was entitled to a conveyance of a good estate in fee-simple, free of all incumbrances."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"17th. The offer of a deed or deeds while the premises were encumbered by mortgages was not an offer to perform on the part of the plaintiff according to the condition of the contract."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"18th. There is no evidence on the part of the plaintiff which will justify the application by the jury of any rule of damages recognized by the law."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

314 "19th. The sale of the real estate at auction did not furnish the measure of damages."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"20th. No pecuniary loss is shown to have been sustained by the plaintiff."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"21st. The evidence shows that the property was worth at the time of the second sale as much as it brought at the first sale."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"22nd. There is no evidence that at the time of the second sale the property was not worth $90,000."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

315 "23rd. The deeds to the Millikens carrying out the second sale, which show their privileges and rights, contain no restrictions of any kind, are in consideration of one dollar, and furnish no proof of what they did or did not pay for the property."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested, as follows:

"24th. The title conveyed to the Millikens, being free of all restrictions, is a waiver or discharge of any claim the plaintiff might have, or, at least, an estoppel to this action."

And that there is error in this, that the said circuit court did refuse to charge and instruct the jury, as then and there requested by the counsel for the defendant, as follows:

"25th. On the whole evidence the defendant is entitled to a verdict."

And that there was error in this, that the said circuit judge, contrary to the objection of defendant's counsel, did charge the jury as follows:

"If you find that the persons for whom the auctioneers acted were Cummings and Weeks, then, this suit having been brought in the name of Cummings alone, and the objection in regard to the non-joinder

316 of plaintiffs, the non-joinder of Weeks, as administrator, and his wife not having been taken by answer, in accordance with the rules of practice and pleading or code of this State such joinder cannot now be taken advantage of by this defendant, and you may treat the action as if it was properly brought."

And that there was error in this, that the said circuit judge, contrary to the objection of defendant's counsel, did charge the jury as follows:

"If you find that prior to the commencement of this suit M'r Walker wrote his name upon this paper as the agent of the seller, and that when this suit was commenced the contract bore upon it in addition to the name of the defendant, which was affixed to the instrument at the time of sale, the name of M'r Walker as agent of the seller, then it is competent for the plaintiff to prove by parol evidence for whom the auctioneer acted as agent; and if you find that he acted as agent of the plaintiff, and that the plaintiff was the person for whom the auctioneer was agent in this auction sale, and who is the vendor, then the requirements are sufficiently complied with. If, on the other hand, you find that the name of Walker was not attached to the paper until after the commencement of this suit, which was instituted prior to April,

317 1872, then as matter of law the names of the vendor or vendors do not appear, either expressly or by implication, in the written contract, or in any of the memoranda attached thereto, and in that event, if you so find, the contract is fatally defective. The evidence in regard to this is contained in the deposition of M'r Minot. The counsel for the defendant claim that the deposition of M'r Minot shows that in May, 1872, after this suit was brought, he examined the contract now before you, and that on that day it did not contain, either upon front or back, the name of M'r Walker. The counsel for the plaintiff contend that an examination of that deposition shows that the defendant is mistaken in the construction which he places upon it, and that M'r Minot simply intends to testify that on the 26th of May, 1871, when this contract was broken, as he alleges, it did not contain the name of A. R. Walker, but does not swear that he made any subsequent examination after the 26th day of May, 1871. But, according to my view of the law upon this question, in regard to the validity of the contract, it turns

upon the fact whether you find that Walker put his name there before the commencement of the suit, or whether you find that he put his name there after the commencement of the suit.

318 That the circuit judge erred in leaving to the jury to determine whether the contract was signed by the auctioneer before or after the commencement of the suit, in the following portion of the charge:

"But according to my view of the law upon this question, in regard to the validity of the contract, it turns upon the fact whether you find that Walker put his name there before the commencement of the suit, or whether you find that he put his name there after the commencement of the suit."

Also, that there was error in the court charging to the jury the following proposition:

"If you find that the paper called Exhibit F was at that time read by the auctioneer, as a part of the terms of sale, then, in my opinion, the deeds tendered are not objectionable, so far forth as they convey a title subject to the mortgages."

Also, that there was error in the court's charging the jury the following proposition:

"The action is brought upon the original written contract. The defendant by one of his pleas denies that the contract was complied with in the provision requiring an unencumbered title.

"The plaintiff replies that at the instance of the defendant the compliance with that portion of the contract had been waived, and that at his request deeds were executed subject to the mortgages which

319 he agreed to accept.

"This reply to the objection that deeds which were called for by the contract were not tendered, it is competent for the plaintiff to make, and if in fact true, is a sufficient excuse for non-performance of the contract in this regard, although the waiver on the part of the defendant was by parol."

And also that there was error in the proposition or charge of the court that if the defendant had by parol, subsequently to the sale, waived compliance with the contract, such a subsequent waiver by the defendant was a sufficient excuse for a non-performance by the plaintiff.

And also that there was error in the following charge or proposition of the court:

"The rule of damages upon a breach of contract for purchase of real estate is the difference between the contract-price and the saleable value of the land at the time of the breach and the expense of the second sale, if second sale there be."

And also that there is error in the proposition or charge of the judge that the expense of the second sale is an element in the rule of damages."

320 Also, that there was error in the following proposition or charge of the court:

"It is said that the second sale was made by the plaintiff as the agent of the defendant, and that plaintiff entered into a private arrangement with the purchaser, Milliken, wherein plaintiff, in the event of the purchase by Milliken, was to become jointly interested with him, and that such private arrangement rendered the second sale void, and destroys its value as an evidence of the damages to which the plaintiff was subject. Now, when the sale is made by an agent or a trustee of the property the person for whom the trustee or agent acts cannot be both buyer and seller, and if a private arrangement is made by which the agent becomes interested in the purchase, such sale, whether it is made

at auction or is made on private terms, is voidable at the option of the principal. It is what is called in law constructively fraudulent. But that principle does not apply here in the rigid way in which it is considered applicable to sales by agents. Plaintiff was not, strictly speaking, an agent for defendant, although the sale was a sale on defendant's account."

Also, that there was error in the following charge or proposition of the court:

321 "The title had not passed to defendant, and the object and the effect of the sale, that is, the object and effect of the sale as far as we are concerned, is to see what the damages were and what the fair market value of the property was. If the sale was in fact unfair, and the parties in interest did not use all proper means to make it productive, then you are to disregard it and make proper deductions from the loss sustained by plaintiff in your estimate of damages.

"And if they, in point of fact, did all they could, and if in point of fact this arrangement with the Millikens enhanced the price which the property brought, then the price which the property brought is to be considered by you as an element of importance."

Also, that there was error in the proposition or charge of the court in reference to the amount of damages in so far as it directed the jury to include the amount of the expenses of the second sale, as contained in the following proposition:

"Add to the actual damages in regard to the saleable value the amount of the expenses of the second sale, which were somewhere
322 in the neighborhood of $700, and to that add interest to the date of the judgment."

And that there is error in this, that the judgment aforesaid appears to have been given for Stephen H. Cummings, when by the law of the land the judgment should have been for the said Joseph Grafton, against the said Stephen H. Cummings, and the said Joseph Grafton prays that the judgment aforesaid, and for other errors in the said record and proceedings being, may be reversed, and that the said Joseph Grafton be restored in all things which he may have lost by reason of the said judgment.

PLATT & GERARD,
Attorneys for the Defendant Joseph Grafton.

(Endorsed:) U. S. circuit court, southern district of New York, in 2nd circuit. Stephen H. Cummings vs. Joseph Grafton. Assignment
323 of errors & prayer for reversal. Platt & Gerard, def't's att'ys, 45 William st., N. Y. City. Filed Sept. 1, 1876.

324 *Bond for costs and damages on writ of error.*

Circuit court of the United States of America for the southern district of New York.

STEPHEN H. CUMMINGS, COMPLAINANT,
vs.
JOSEPH GRAFTON, DEFENDANT.

Know all men by these presents that we, William Remsen and Robert R. Stuyvesant, both of the city of New York, are held and firmly bound unto the above-named Stephen H. Cummings in the sum of fifty thousand dollars, to be paid to the said Stephen H. Cummings, for the pay-

ment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, *heirs*, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our
325 seals and dated the tenth day of February, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas the above-named Joseph Grafton hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment rendered in the above-entitled action by the judge of the circuit court of the United States for the southern district of New York.

Now, therefore, the condition of this obligation is such that if the said Joseph Grafton shall prosecute his writ of error to effect, and answer all damages and costs if he shall fail to make his writ of error good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

WILLIAM REMSEN. [L. S.]
ROB'T R. STUYVESANT. [L. S.]

Sealed, delivered, taken, & acknowledged this 16th day of February, 1876, before me.

JOSEPH GUTMAN, J'R,
United States Commissioner S. D. of N. Y.

326 UNITED STATES OF AMERICA,
Southern District of New York, ss:

William Remsen and Robert R. Stuyvesant, being severally duly sworn, do depose and say, each for himself, that he is a resident and freeholder in the city of New York; that he is worth the sum of one hundred thousand dollars, over and above all his just debts and liabilities.

WILLIAM REMSEN.
ROB'T R. STUYVESANT.

Sworn to before me this 16th day of February, 1876.

JOSEPH GUTMAN, J'R,
United States Commissioner S. D. N. Y.

(Endorsed:) U. S. circuit court. Stephen H. Cummings vs. Joseph Grafton. Bond for costs and damages on writ of error.
327 Platt & Gerard, attorneys, 45 William st't, N. Y.

Approved as to form and sufficiency.

ALEX. S. JOHNSON,
Cir. J.

Filed Feb'y 21, 1876.

328 The United States of America to Stephen H. Cummings, defendant in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Joseph Grafton is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness Hon. Alexander S. Johnson, judge of the circuit court of the United States for the southern district of New York, this 18th day of February, A. D. 1876.

ALEX. S. JOHNSON,
Cir. J.

329 We hereby admit due service of the within citation, and appear for the said Stephen H. Cummings, the defendant in error herein.

Dated New York, Feb'y 21st, 1876.

(Indorsed:) U. S. circuit court. Joseph Grafton, pl'ff in error, vs. Stephen H. Cummings, def't in error. Citation. Platt & Gerard, att'ys for pl'ff in error, 45 William s't. Filed Feb'y 24th, 1876.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

George W. Denton, being duly sworn, says he is of full age. That on the 21st day of February, A. D. 1876, he served the within citation on Barney, Butler and Parsons, attorneys of record for the said Stephen H. Cummings, defendant in error herein, by delivering a true copy thereof to and leaving the same with M'r Hubbard, a member of said firm, personally, at their office, No. 111 Broadway, New York City, in said district, at the same time exhibiting to him the within original citation and the signature of the judge thereto.

GEO. W. DENTON.

Sworn to before me this 24th day of February, 1876.

JOHN A. SAISTOL,
U. S. Commissioner for N. Y.

330 Supreme Court of the United States.

STEPHEN H. CUMMINGS, DEFENDANT IN ERROR,
ads.
JOSEPH GRAFTON, PLAINTIFF IN ERROR.

And afterwards, to wit, on the second Monday of October, in the October term, in the year of our Lord one thousand eight hundred and seventy-six, the said Stephen H. Cummings, by Butler, Stillman & Hubbard, his attorneys, freely comes here in court and says that there is no error either in the record or the proceedings aforesaid, or in the giving of the judgment aforesaid, and he prays that the said Supreme Court of judicature, by the justices thereof now here, may proceed to examine as well the record and the proceedings aforesaid as the matters aforesaid above
331 assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, and c.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendant in Error.

(Indorsed:) U. S. Supreme Court. No. 738. Stephen H. Cummings, defendant in error, ads. Joseph Grafton, plaintiff in error. Joinder in error. Butler, Stillman & Hubbard, att'ys for def't in error. Filed 4th October, 1876.

(Indorsement on cover:) No. 179. Joseph Grafton, plaintiff in error, *vs.* Stephen H. Cummings. S. New York, C. C. U. S. Filed 4th October, 1876.

SUPREME COURT OF THE UNITED STATES

Oct. Tr., 1878, No. 179.

JOSEPH GRAFTON, PLAINTIFF IN ERROR,

vs.

STEPHEN H. CUMMINGS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

U. S. Supreme Court.

JOSEPH GRAFTON,
Plaintiff in Error,
against
STEPHEN H. CUMMINGS,
Defendant in Error.

No. 179.

Brief for Plaintiff in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

Trial before Hon. NATHANIEL D. SHIPMAN and a jury, November Term, 1874. Verdict in favor of plaintiff for $15,000 and interest; aggregate $18,821$\frac{68}{100}$. (70.)

Writ of Error sued out by defendant. (1.)

The litigation grew out of an alleged sale at auction of the "Glen House" property, real estate and furniture, in the White Mountains, on the 16th of May, 1871; a refusal on the part of Grafton, defendant, to accept title offered; and an attempted re-sale of the property at a reduced price, asserted and pretended to have been made on account of defendant Grafton (Declaration, *fol.* 6).

In the first count of the declaration, it is alleged that, at Gorham, in New Hampshire, the plaintiff, by his auctioneer and agent in that behalf, caused to be exposed for sale at auction, the land, buildings and furniture known as the Glen House, in New Hampshire, subject to the following among other terms and conditions of sale, to wit: That ten days be allowed to examine the title, within which time the property must be settled for; that five thousand dollars must be paid by the purchaser on the spot, fifteen thousand dollars on the delivery of the deed, and one-half of the balance on the 1st of September, 1871, and the remaining half on the 1st of September, 1872. That at that sale the defendant was declared to be the purchaser at $90,000, and the plaintiff undertook to convey it by a good and sufficient deed, and comply on his part with the terms and conditions. That defendant thereupon signed an agreement in writing for the purchase of the property at the sum of $90,000, according to the terms and conditions of sale. That the plaintiff tendered to the defendant proper deeds, which were refused, and demanded payment of the moneys, and that defendant should take the property and comply. That on the 26th of May, the defendant refused to comply with the purchase, and wholly discharged the plaintiff from further performance on his part of his promises and undertakings, and in consequence of the neglect and refusal of the defendant, the plaintiff exposed the property again at auction at a loss of $29,000.

The second count is to recover $5,000, which it is alleged should have been paid at the time of the auction (12 to 14).

The third count is *indebitatus assumpsit* for

$90,000, the whole purchase price, and the fourth count is *indeb. assump.* for the $5,000 (fols. 14, 15).

The pleadings as they stand commence with the general isssue, and raise by special pleas and rejoinders—

1. The general issue.

2. That there was no contract, the paper signed by the defendant not being signed by either the plaintiff or the auctioneer, and no person being named therein as vendor.

3. That under the terms of sale the defendant was entitled to a good title, free of all incumbrance, which could not be given by reason of mortgages on the property, and also that there was no right on the part of the plaintiff to sell.

4. That the plaintiff had no right to resell the property on account of the defendant, and that a sale at auction under such circumstances was no measure of damages.

5. That the terms of resale were different from the terms on the first sale, and that the resale was fraudulently made.

From the bill of exceptions, commencing at folio 73, it appears that the plaintiff proved that the property was sold at auction on the 16th of May, 1871; that at that time the legal title of two-thirds of the real estate stood on the land records of the county in the name of, and was vested in fee simple in, James M. Thompson, theretofore deceased, and only one-third in the name of Stephen H. Cummings, the plaintiff (fol. 74).

Cummings's third had been purchased with his individual funds from Mr. Thompson, under an

agreement that Cummings and Thompson should form a partnership to carry on the Glen House Hotel, which was thereupon formed, and in which Thompson had two-thirds and Cummings one-third interest, and the property was occupied by this partnership (fol. 74).

Prior to the death of Thompson, he and Cummings had conducted the business of the hotel under the name of J. M. Thompson & Co., under this partnership (fol. 75).

On the death of Thompson, the plaintiff, surviving partner, undertook to liquidate the business of the partnership, and gave to the administrator of Mr. Thompson a bond, conditioned that if Cummings, surviving partner as aforesaid, should account and pay to the administrator of Joseph M. Thompson such share of the partnership property as may of right belong to the estate of said Thompson after the payment of the debts of the copartnership, and the necessary expenses of adjusting the same, then the obligation to be void; and plaintiff thereupon continued in possession of the property (fol. 75).

The auction sale of the property May 16, 1871, was conducted by A. R. Walker, at Gorham, in the State of New Hampshire (fol. 75).

Mr. Walker died before the trial. He was employed as auctioneer by the plaintiff Cummings, and the Glen House property and furniture were bid off by the defendant Grafton at $90,000 (fol. 75).

The defendant thereupon subscribed an agreement, of which the following is a copy (fol. 76):

"I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the Glen House, with furniture belonging to it, in Green's

grant, New Hampshire, and sold at auction Tuesday, May 16th, 1871, at 11 o'clock A. M., and for the sum of ninety thousand dollars, the said property being more particularly described in the advertisement hereunto affixed; and I hereby bind myself, my heirs and assigns, to comply with the terms and conditions of the sale, as declared by the auctioneer at the time and place of sale.

"JOSEPH GRAFTON."

Upon the margin of said agreement were written and printed the following (fol. 77):

"TERMS OF SALE.

"Ten days will be allowed to examine the title, within which time the property must be settled for. $5,000 will be required of the purchaser on the spot, which will be forfeited to the seller if the terms and conditions are not complied with; but the forfeiture of said money does not release the purchaser from his obligation to take the property. Fifteen thousand dollars to be paid on the delivery of the deed, and one-half of the purchase-money to be paid Sept. 1, 1871, the remaining balance to be paid Sept. 1, 1872.

"The property is sold subject to the conditions of the sale of the stage route, stages, &c., which are that the proprietors of the route shall have the exclusive business of the house" (fol. 77).

The advertisement referred to in the foregoing paper as being thereunto affixed, was as follows:

"GLEN HOUSE AT AUCTION.

"The famous summer resort at the foot of Mount Washington, known as the Glen House, together with the land, furniture, mill, and outbuildings, will

be sold at public auction, at Gorham, N. H., Tuesday, May 16, 1871, at 11 o'clock A.M.

" May 2d, 1871.

" *Valuable Hotel Property for Sale.*

"The favorite summer resort, known as the Glen House, situate at the foot of Mt. Washington, and at the commencement of the carriage road to the summit, will be offered for sale, together with the land, containing about one thousand acres (well timbered). All the outbuilding, stable, and mill on the same; also the furniture, staging, mountain carriages, horses, &c. The house contains two hundred and twenty-five rooms, capable of accommodating between four and five hundred guests. The whole property, if not disposed of at private sale previous to the first of May, will be sold at public auction, to close the estate of the late J. M. Thompson.

" Notice of the time and place of sale will be given hereafter.

" Any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Maine." (78, 79).

The paper when put in evidence was endorsed " A. R. Walker, auctioneer and agent for both parties " (79). No other paper-writing was subscribed or signed by Capt. Grafton (79).

The evidence shows that this endorsement was not put on at the time of the auction sale, and the contention of the defendant was that it was not put on until after the commencement of the action.

The evidence is clear that it was not on upon the 26th of May, 1871 (fol. 202, 203), at the time of the alleged refusal on the part of Capt. Grafton to accept the deeds.

Prior to the 16th of May, the day of sale, three deeds were prepared and duly executed by the plaintiff and James W. Weeks, administrator of J. M. Thompson, by Mrs. Catherine Thompson, the widow of Mr. Thompson, which deeds were tendered by the defendant on the 26th day of May, 1871, at the City of Boston (81).

The deeds contained a clause that the sale was "made subject to the conditions of the sale of the stage *and mountain* routes, horses and carriages, connected with the Glen House situated upon said premises, which are that the proprietors of said Glen House shall allow the proprietors of said stage routes and property to have the exclusive staging, livery, and stable business of said Glen House" (85, 89). When the deeds were tendered, the plaintiff tendered to the defendant a bill of sale of the furniture and personal property in and about the premises (92).

The defendant refused to accept the deeds and complete the purchase, and his friend, Mr. Minot, at defendant's request, read a paper stating as his grounds therefor, that he refused to accept them "because of the conditions in the papers now tendered, which are not in accordance with the terms stated on the sale; because of the mortgages now on the estate outstanding; and because the title is otherwise not satisfactory." (92.)

The bill of sale to Capt. Grafton is at fol. 111, and merely states, over the signature of plaintiff, that Joseph Grafton bought, for $21,000, all the furniture of every description belonging to the Glen

House, sold by S. H. Cummings, as surviving partner (111).

The plaintiff also gave evidence tending to prove the insolvency of the estate of J. M. Thompson, the appointment of Mr. Weeks as administrator of his estate, and also, under objection, three sections of the Revised Statutes of New Hampshire (93, 94), requiring, in substance, that on the death of any member of a copartnership, the surviving partner shall, within a certain time, return an inventory of the debts due the copartnership, which are to be appraised by appraisers, and the surviving partner shall, at the request of the administrator of the deceased partner, give a bond conditioned to account and pay over to the administrator the share belonging to the deceased partner (93, 94, 95).

The making of the appraisement and the giving of a bond was also proven (fol. 96 to 98).

At a second sale on the 9th of June, 1871, the property was sold for $61,000 (fol. 93).

The advertisement for the second sale stated that the property would be sold on account of Joseph Grafton (112).

The plaintiff also gave evidence tending to prove that the second sale was made at the same place where the first sale took place (114), and by the same person acting as auctioneer, and that Mr. Minot, the gentleman referred to, was present, and objected to and forbade its taking place on account of Mr. Grafton, and bid upon the property, and the property was sold (114).

Thereupon one C. T. Milliken and Stephen H. Cummings, the plaintiff, signed the agreement of purchase, in which *they* acknowledge themselves to be the purchasers (115, 116); the bid had been made by *C. R.* Milliken (114).

The terms on the second sale (117) contained a condition not contained in the terms and conditions of the first sale subscribed by defendant, as follows:

"*There are mortgages on the property amounting to about* $51,000, *and any amount (not already secured by mortgage), after the payment of the* $20,000, *must be made secure to the satisfaction of the sellers.*

"The property is sold subject to the conditions of the sale of the stage *and mountain* route, etc., which are that the proprietor of the routes shall have the exclusive *stage and mountain* business of the house, *and that the house shall be kept open* AS *heretofore*" (117).

It was claimed on the part of the plaintiff that another paper, designated Exhibit F, in folio 103 of the case, was read by the auctioneer at the time of the first sale. That paper reads:

"There are mortgages on the property amounting to about $51,000. Any amount not already secured by mortgage after the payment of the twenty thousand dollars must be made secure to the satisfaction of the seller. The house to be kept open as heretofore."

Neither at the time of the first nor of the second sale had the staging property and livery business been sold, and nothing had been done in relation to their sale before the second sale (fol. 232), but it was subsequently sold to another party (fol. 121).

It was proven that the Glen House property, beside the hotel, consisted of about 800 acres of land, a saw mill which had never been used except for business of the house; that there was a stable which would accommodate about 125 horses, a carriage-house that would accommodate some four or five stages, and a dozen mountain wagons, and that there was no other car-

riage-house or accommodation for carriages except that house, and that there never was any livery business outside of the stages (124)

It was also proven that Mr. Cummings, the plaintiff, before the second sale, talked with Mr. Milliken, who afterward became the purchaser with him, and it was understood that if Mr. Milliken purchased the property, the plaintiff, Cummings, should stay and help run the house and have a part of the property, on condition that he should make certain payments towards it as they went along; that the plaintiff was to have half the property under that arrangement if Milliken purchased it, and remain there and carry on the hotel if he could make the payments; that he had this talk with Mr. Milliken two or three days before the second sale in Portland (125); that there was no written agreement before the sale between Milliken and plaintiff, but after the sale Milliken gave plaintiff a written agreement, drawn up right after the second sale, *in accordance with the agreement that had been made before the sale took place* (126); that the *plaintiff's one-third of the property was not turned* in, but the plaintiff was to have one-half from Milliken on the payment of one-half of what Milliken paid, and that this was the resale of the property which plaintiff referred to as made on account of the defendant (126); that plaintiff paid about $20,000 towards the purchase of the property under this agreement (129).

The plaintiff claimed that he did not talk with any one about getting the property at a low price (129), and that he made a part of his payment at the time the bond was drawn after the sale, and that the $5,000 paid by Mr. Milliken on the day of the

sale went towards paying the debts of J. M. Thompson & Co. (129, 130).

The agreement between plaintiff and Milliken is at folios 225 to 230.

The plantiff employed the auctioneer on the first sale (75), and also on the second sale (127).

At the first sale the property was started at a maximum sum *and run down* to $90,000 (100); while at the second sale it was started at a minimum sum *and run up* to $61,000 (120). In the terms of the first sale, signed by the defendant, there was nothing requiring the house to be kept open (77); but in the terms of the second sale was inserted "*The house shall be kept open* AS *heretofore*" (117).

In the terms of sale advertised for the first sale, and which Captain Grafton claimed were the only terms on which that sale was made, no mention whatever was made of the fact that there were any mortgages on the property (77); and there was nothing in the case to show that there was any notice given that the property was not free and clear, or that the purchaser was bound to keep the house open, except, as it appeared, if Exhibit F was competent for that purpose (103).

On the other hand, by the terms of the second sale it conspicuously appeared that the property was encumbered by mortgages to the extent of $51,000, and that the house should be kept open, as before (117).

The evidence did not show that the plaintiff had sustained any damages by reason of the failure on the part of the defendant to complete the agreement.

Assignment of Errors Relied Upon.

1*st*. That the Circuit Court admitted, in evidence to the jury, the evidence of the plaintiff (fol. 288) of the conversation which occurred on the day prior to the sale with the defendant, in reference to the sale; in the course of which conversation defendant asked plaintiff about the amount of mortgages upon the property, and that the plaintiff told him, as near as he could at the time, what amount was held by plaintiff's father, what amount by Mr. Weston, and what amount by Mr. Jones—amounting, in all, to about $51,000. That the defendant then asked him about the amount of the debts against the estate; that he told him as near as he could about the partnership and personal debts of S. M. Thompson; that he told him the encumbrances were somewhere about $100,000.

2*d*. That the said Circuit Court admitted in evidence the endorsement upon the paper which had been subscribed by defendant at the time of the sale, which endorsement was as follows (fol. 289): "A. R. Walker, auctioneer, and agent for both parties."

3*d*. That the said Circuit Court admitted in evidence the paper writing marked Plaintiff's Exhibit F, No. 6 (fol. 103–290), which is as follows: "There are mortgages on the property, amount-
"ing to about $51,000. Any amount not already
"secured by mortgage, after the payment of

"the $20,000, must be made secure to the satis-
"faction of the seller. The house to be kept
"open as heretofore."

4*th*. That the said Circuit Court admitted in evidence the following testimony (fol. 104–290): "Q. "What did he say? Ans. He explained what "was meant in regard to the condition of the "staging; that the purchaser of the property "had the privilege of buying the staging at "an appraisal of three disinterested parties; "or, if he did not, then the house had agreed or "would agree to give the staging business of "the house."

5*th*. That the said Circuit Court allowed to be put to the witness the question (fol. 105–291): "Did the auctioneer say anything about these "encumbrances on the right of the purchaser to "take subject to the mortgages?" and admitted in evidence the answer thereto: "Yes, sir; "he said this could be arranged. He said they "could be continued; could be arranged to "continue, if the purchaser did not want to take "them up immediately. That was the under-"standing, as far as I can state it in his words; "that is what he meant to convey."

6*th*. That the said Circuit Court allowed to be put to the witness the question (fol. 107–292): "Q. If "the purchaser did want to take them up?" and admitted in evidence the answer thereto: "Ans. "Yes, sir."

7*th*. That the said Circuit Court allowed to be put

to the witness the question (fol. 108–292): "Q. "What was the message?" and admitted in evidence the answer thereto: "Ans. I sent word and "requested my father to ask the defendant if the "man I had to work there in the garden—get- "ting ready the vegetable garden of the house— "and the other hands about the place—whether "I should let them go on with the work, or "whether they should stop until we took pos- "session."

8*th*. That the said Circuit Court admitted in evidence the following (fols. 112, 113–293):

"Positive sale of the Glen House—valuable hotel property—at auction, situated at the foot of Mount Washington.

"On Friday, June 9, 1871, at 12 o'clock noon, at the Alpine House, in Gorham, New Hampshire, on account of Joseph Grafton, will be sold the above hotel property, together with the furniture belonging to it, situated in Green's Grant, in the State of New Hampshire, it being the same property sold at the Alpine House, in Gorham, N. H., on Tuesday, May 16, 1871, at 11 o'clock A. M., by order of J. W. Weeks, administrator of the estate of the late J. M. Thompson and Stephen H. Cummings, surviving partner of said Thompson, said Joseph Grafton having failed to comply with the terms and conditions of the sale. The property will be sold on his account to the highest bidder on Friday, June 9th, 1871, at the Alpine House, in Gorham, N. H., at 12 o'clock noon. $5,000 will

be required of the purchaser at the time and place of sale.

"STEPHEN H. CUMMINGS,
Surviving Partner.
"JAS. M. WEEKS,
Administrator of the Estate of J. M. Thompson."

9th. That the said Circuit Court admitted in evidence the following (fols. 115, 116, 117–295):

"GORHAM, N. H., June 9th, 1871.

"We, the subscribers, do hereby acknowledge ourselves to be the purchasers of the estate known as the Glen House, in Green's Grant, New Hampshire, and sold at auction on Friday, June 9th, 1871, with the furniture belonging to it, at 12 o'clock noon, and for the sum of sixty-one thousand dollars, said property being more particularly described in the advertisement hereunto affixed; and we hereby bind ourselves, our heirs and assigns, to comply with the following terms and conditions of the sale, as declared by the auctioneer at the time and place of sale, and at the sale, May 16, 1871.

"C. T. MILLIKEN,
[5c. stamp.] "S. H. CUMMINGS."

"*Terms and Condition of Sale.*

"Ten days will be allowed to examine the title, within which time the property must be settled for at the office of the auctioneer. Five thousand dollars will be required of the purchaser, on the spot, which will be forfeited to

the sellers if the terms and conditions are not complied with, but the forfeiture of said money does not release the purchaser from his obligation to take the property; fifteen thousand dollars must be paid on the delivery of the deed, and one-half of the balance of the purchase-money to be paid Sept. 1, 1871; the remaining balance to be paid Sept. 1, 1872.

"There are mortgages on the property amounting to about $51,000, and any amount not already secured by mortgage, after payment of the twenty thousand dollars, must be made secure to the satisfaction of the sellers.

"The property is sold subject to the conditions of the sale of the stage and mountain route, &c., which are, that the proprietor of the routes shall have the exclusive stage and mountain business of the house, and that the house shall be kept open as heretofore."

On the back:

"GORHAM, N. H., June 9, 1871.

"We, the undersigned, assent to the within.

"JAMES W. WEEKS,
Administrator.

"STEPHEN H. CUMMINGS."

10*th*. That the said Circuit Court allowed to be put to the witness the question (folio 118–296): "Did you have any conversation with Mr. Minot about that sale, or hear him make any statement in reference to it, other than what you have said at this second sale?" and admitted in evidence the answer thereto (folio 119–296) as follows: "Mr. Walker, the auctioneer, in my pres-

ence, also asked him (Mr. Minot) a question in regard to what the property brought; if it brought more at that sale than on the first, who the difference belonged to, and he stated that it belonged to Mr. Grafton. Mr. Minot also said that he objected to the sale, or forbade the sale. He said that at the time the auctioneer was about commencing the sale, and outside in the presence of all."

11*th*. That the said Circuit Court allowed to be put to the witness the question (fol. 119–297), "What did Mr. Minot bid?" and admitted in evidence the answer thereto (fol. 120–297): "Mr. Minot started it at $52,000. I think that was the first bid. And then there was a young gentleman that came up with Mr. Minot, who I understood was a clerk in Mr. Minot's office. He made another bid, and then Mr. Minot again, and so on until it ran to something like $60,000. Mr. Milliken bid, but not until after they got up to something over $55,000. The last bid Mr. Minot made was $60,000, and Mr. Milliken bid $61,000. It was knocked down to Mr. Milliken. It was afterward conveyed to Mr. Milliken, and he is the present proprietor."

12*th*. That the said Circuit Court allowed the witness to be asked to "give an estimate of what was the value of wild land in that vicinity" (fol. 127–298), and admitted in evidence the answer thereto (127–298), that, "this piece of about 800 acres or more, sold for about $10,000. It was more valuable as a hotel than anything else. I really don't know what land about there

is worth. The land is worth about what the stumpage was worth. It depends upon how much timber there is upon it."

13*th*. That said Circuit Court admitted in evidence the following (131, 132–299):

"BOSTON, May 24, 1871—Wednesday.

"Was present during a conversation at 48 Winter Street, between Messrs. Joseph Grafton and A. R. Walker, in reference to purchase of Glen House by Mr. Grafton, at auction, on the 16th instant. Mr. Grafton stated that he had bid off the property at the suggestion of Judge Davis, who told him that certain parties—creditors—in Portland, whom he represented, would join him in the purchase for the mutual protection of Mr. Grafton and themselves. Mr. Grafton also said that he was much surprised on receiving a letter from Judge Davis after his return to New York, stating that the parties referred to declined having anything to do with the property. He further stated that he would rather lose the amount of his claim than have $90,000 worth of property on his hands. Mr. Joseph Grafton, purchaser of Glen House, called Mr. Walker, handed him the deeds of the property executed, upon which Mr. Grafton remarked that he wished to show them to his attorney; an appointment was then made for a meeting in half an hour at Mr. Minot's office, Court Street, Mr. Walker to take the deeds with him."

14*th*. That the said Circuit Court allowed to be put to the witness the question (fols. 154–300), "Was anything more said about the encum-

brances and the $51,000 of mortgages than what you have stated?" and admitted the answer thereto (154–300): "Not before the sale, I think. I would say that I think I stated the arrangement of the mortgages; a part of them—about $28,000—stood against J. M. Thompson & Co., to Nathan Cummings, and the balance against J. M. Thompson; and about $16,000, more or less, of J. M. Thompson's debts were unsecured."

15*th*. That the said Circuit Court admitted in evidence testimony, at folios 159–300, that "Mr. Minot was present at the second sale; I saw Mr. Minot and a young man by the name of Jackson there, and had some conversation. Just before the sale he (Minot) suggested to Walker to make the terms of sale precisely the same as they were at the first sale, which I think he did. I so understood it, according to my recollection. Mr. Minot, when the matter was called up, forbid the sale in a loud voice, so as to be heard by those present, and stated in the first sale it was not stated that the house was to be kept open as theretofore; that that was a new clause, and was not contained in the declaration of the auctioneer at the first sale."

16*th*. That the said Circuit Court allowed to be put to the witness (fols. 160–301), "What did Mr. Minot say to you in reference to his acting for Captain Grafton?" and admitted in evidence the answer thereto (fols. 161–301): "He said that the objection that Captain Grafton had to taking the property was, that the horse property had the exclusive benefit of the house, and that that was an encumbrance on the property."

17*th*. That the said Circuit Court allowed to be put to the witness the question (fols. 164–302), "State what was said?" and admitted in evidence the answer thereto (fols. 164–302): "Prior to the auction sale there had been a good deal of talk, in the presence of Mr. Grafton and with him, between Mr. Grafton and Mr. Weeks and myself, as to the amount of mortgage on the property, and the amount was known, except one mortgage—the one that was then held by the Casko Bank, of Portland That was ascertained from the elder Mr. Cummings, who was present, and the amount of mortgages was determined to be about $51,000. There was some talk whether the property should be sold subject to the mortgages, or not."

18*th*. That the said Circuit Court allowed to be put to the witness the question (fol. 165–302): "State what that conversation was?" and directed the witness to state the result of the discussion about the mortgages, and also whether, in pursuance of that result, it was embodied in the paper Exhibit F, No. 6 (fol. 103).

19*th*. That the said Circuit Court allowed to be put to the witness the question (fol. 169–303): "What, if anything, was said about the house being kept open?" and admitted in evidence answer thereto: "That was one of the terms of the sale, that the house should be kept open as usual, because John Lindsey had bought, or had the refusal of, the staging of the house. This was said by the auctioneer when it was

sold. It was stated by the auctioneer at the time of the sale that the purchaser of the real estate had the right to take the staging at the appraisal of men if it was not run to the satisfaction of the purchaser of the house."

20*th*. That the said Circuit Court allowed to be put to the witness the question (fol. 170–304): "What effect, if any, would the late period in the season of the year at which the second sale occurred have upon the value of real estate and furniture?" and admitted in evidence the answer thereto: "It would have considerable effect, because the house ought to be cleaned up and put in order so as to have the house open in the middle of June; that he could not tell the difference in dollars and cents; that the value would be diminished by the sale being later."

21*st*. That the said Circuit Court allowed to be put to the witness the question (fol. 172–304): "Whether or not the encumbrances of mortgages existing on the property was mentioned in any way by the auctioneer?" and admitted in evidence the answer thereto: "He thinks that the amount was stated, and that it was stated it would be about $50,000; that he could not say whether anything was said by the auctioneer about the house being kept open, but he thinks the right was reserved to the purchaser of the real estate to take the staging property when it was not run to suit the proprietor of the house; that this declaration was made by the auctioneer at the time the property was put up for sale."

22*d*. That the said Circuit Court allowed to be put to the witness the question (fol. 175–305): "Do you know what the auctioneer, Walker, charged as commission for services in selling the property?" and admitted in evidence the answer thereto: "He charged one per cent."

23*d*. That the said Circuit Court refused to strike out the evidence of the witness Weeks (fol. 177–305).

24*th*. That the said Circuit Court allowed to be put to the witness the question (fol. 233–306), "Can you state what made the difference in the price received for the same property on the 16th of May, and on the second sale on or about the 9th of June?" and admitted in evidence the answer thereto: "There was a good many objections why people would not bid on the sale in June. There were a good many repairs to be made, and the house could not be got ready, as it should have been, in time for the business of that season. There was not time to get the requisite number of servants and help to run it. It takes over a hundred persons to do the business of the house."

25*th*. That the said Circuit Court allowed to be put to the witness the question (fol. 236–307): "Do you recollect your son (plaintiff) asking you to take a message to Capt. Grafton?" and admitted in evidence the answer thereto: "I think the same day of the sale I went up to the Glen House, and Mr. Cummings told me he had to go to another place—to the sale of the Jackson

farm, I think—and should not go down. When I went down I delivered the message to Mr. Grafton. I told him that Cummings had a large number of men employed, at a very considerable expense, and he wished to know whether they should continue the employment or dismiss them. Capt. Grafton referred me to Mr. Woodbury Davis. I went to him and said that I was referred to him by Mr. Grafton, and I think I told him what I was referred to him about, and gave him the message, and he said that he was going to the Glen House himself."

26*th*. That the said Circuit Court admitted in evidence and allowed to be read to the jury as testimony the following letter (fols. 238-307, 308):

"DEAR SIR—I came up to-day hoping to confer with you in regard to the purchase of the Glen House. I don't know but that Lindsey and Barron intend to take it. Something they said indicated as much, and Grafton offered to let them take it at his bid, and let them have their own time to pay him his claim. But I find Mrs. Thompson is strongly attached to the place. The Judge of Probate will make her an allowance. It occurred to me that the purchase might be made in this way. One-tenth would be $9,000:

S. H. Cummings,	$\frac{3}{10}$	$27,000
Lindsey,	$\frac{3}{10}$	27,000
Barron,	$\frac{3}{10}$	27,000
Mrs. Thompson,	$\frac{1}{10}$	9,000
		$90,000

"This would relieve you from most of the care. It would give Mrs. Thompson an interest in it. The $9,000 due Grafton is as much as her share, and I will agree to let it be until she has time to pay it from the profits. I go home to-morrow, but I wanted to propose this to you, as Grafton really don't want anything to do with the property, though he thinks Stevens, or some one of their leading hotel men, may have some young man that they would like to put into the house. He will try to dispose of it in that way, but hopes that before doing it I shall be able to write to him that it will be taken up here.

"Very truly yours,

"WOODBURY DAVIS.

"S. H. Cummings, Esq."

27*th*. That the said Circuit Court refused to charge and instruct the jury as requested (fols. 242–309), that "no contract was made for the sale and purchase of real estate between the plaintiff and defendant."

28*th*. That said Circuit Court refused to charge and instruct the jury as requested (fols. 243, 309), that "if the sale was made on the part of the plaintiff and Weeks, the administrator, this action cannot be maintained by Cummings alone, and the defendant is entitled to a verdict."

29*th*. That said Circuit Court refused to charge and instruct the jury as requested (fols. 244–310), that "the administrator Weeks not being a

party plaintiff to this action, it cannot be maintained."

30*th*. That said Circuit Court refused to charge and instruct the jury as requested (fols. 245–310), that "under the evidence in this action, the only agreement on the part of the defendant which the jury can consider, if any, is Exhibit E, which was subscribed by defendant." (Exhibit E is at fol. 76, and inserted below in 39th Assignment of Error.)

31*st*. That the said Circuit Court refused to charge and instruct the jury as requested (244, 310), that "the paper Exhibit F did not form any part of the contract between the parties, and cannot be regarded or considered by the jury."

32*d*. That the said Circuit Court refused to charge and instruct the jury as requested (245–310), that "under the evidence the real estate in question did not belong to the copartnership of J. M. Thompson & Co., and the plaintiff was not authorized to make a sale thereof, and a conveyance thereof, in his character as surviving partner."

33*d*. That the said Circuit Court refused to charge and instruct the jury as requested (246–311), that "the deed tendered as executed by the administrator did not confer or grant any title to the real estate."

34*th*. That said Circuit Court refusd to charge and instruct the jury as requested (247–311), that "Weeks, the administrator, was required by

his license to make a sale at public auction. He could not adopt as his own a sale at auction made by another party, having and representing in said sale a distinct interest in the property."

35*th*. That said Circuit Court refused to charge and instruct the jury as requested (247–311), that "the administrator, Weeks, could only sell the property in the manner prescribed, and according to the terms prescribed in his license."

36*th*. That the said Circuit Court refused to charge and instruct the jury as requested (248–312), that "the license did not authorize the administrator to make the sale, or execute the conveyance mentioned in the evidence in this suit."

37*th*. That the said Circuit Court refused to charge and instruct the jury as requested (248–312), that "the plaintiff Cummings, in making the second sale, being interested in the purchase, and he subscribing the agreement as purchaser, thereby destroyed any claim he might otherwise have had against the defendant."

38*th*. That the said Circuit Court refused to charge and instruct the jury as requested (248–312), that "if a valid sale had been proven on behalf of the plaintiff, and a breach shown by the defendant, there cannot, in any view of the evidence, be a recovery of more than nominal damages."

39th. That the said Circuit Court refused to charge and instruct the jury as requested (249-313), that "under the sale the defendant was entitled to a deed free and clear of all incumbrances, and subject only to the conditions specified in Exhibit E as to the staging."

Exhibit B.

"I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the Glen House, with furniture belonging to it, in Green's grant, New Hampshire, and sold at auction Tuesday, May 16th, 1871, at 11 o'clock A. M., and for the sum of ninety thousand dollars, the said property being more particularly described in the advertisement hereunto affixed; and I hereby bind myself, my heirs and assigns, to comply with the terms and conditions of the sale, as declared by the auctioneer at the time and place of sale.

"JOSEPH GRAFTON."

Upon the margin of said agreement were written and printed the following (fol. 77):

"TERMS OF SALE.

"Ten days will be allowed to examine the title, within which time the property must be settled for. $5,000 will be required of the purchaser on the spot, which will be forfeited to the seller if the terms and conditions are not complied with; but the forfeiture of said money does not release the purchaser from his obligation to take the property. Fifteen thousand dollars to be paid on the delivery of the deed, and one-half of the purchase-money to be paid Sept.

1, 1871, the remaining balance to be paid Sept. 1, 1872.

"The property is sold subject to the conditions of the sale of the stage route, stages, &c., which are that the proprietors of the route shall have the exclusive business of the house" (fol. 77).

The advertisement referred to in the foregoing paper as being thereunto affixed, was as follows:

"GLEN HOUSE AT AUCTION.

"The famous summer resort at the foot of Mount Washington, known as the Glen House, together with the land, furniture, mill, and outbuildings, will be sold at public auction, at Gorham, N. H., Tuesday, May 16, 1871, at 11 o'clock A.M.

"May 2d, 1871.

"*Valuable Hotel Property for Sale.*

"The favorite summer resort, known as the Glen House, situate at the foot of Mt. Washington, and at the commencement of the carriage road to the summit, will be offered for sale, together with the land, containing about one thousand acres (well timbered). All the outbuilding, stable, and mill on the same; also the furniture, staging, mountain carriages, horses, &c. The house contains two hundred and twenty-five rooms, capable of accommodating between four and five hundred guests. The whole property, if not disposed of at private sale previous to the first of May, will be sold at public auction, to close the estate of the late J. M. Thompson.

"Notice of the time and place of sale will be given hereafter.

"Any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Maine." (78, 79).

40*th*. That said Circuit Court refused to charge and instruct the jury as requested (250–313), that "by the terms of sale the defendant was entitled to a conveyance of a good estate in fee simple, free of all encumbrances."

41*st*. That said Circuit Court refused to charge and instruct the jury as requested (fols. 250–313), that "the offer of the deed or deeds while the premises were encumbered by mortgages was not an offer to perform on the part of the plaintiff, according to the condition of the contract."

42*d*. That said Circuit Court refused to charge and instruct the jury as requested (fols. 251–313), that "there is no evidence on the part of the plaintiff which will justify the application by the jury of any rule of damages recognized by the law."

43*d*. That said Circuit Court refused to charge and instruct the jury as requested (fols. 251–314), that "the sale of the real estate at auction did not furnish the measure of damages."

44*th*. That said Circuit Court refused to charge and instruct the jury as requested (fols. 252–314),

that "no pecuniary loss is shown to have been sustained by the plaintiff."

45*th*. That said Circuit Court refused to charge and instruct the jury as requested (fols. 252–314), that "the evidence shows that the property was worth at the time of the second sale as much as it brought at the first sale."

46*th*. That said Circuit Court refused to charge and instruct the jury as requested (fols.253–314), that "there is no evidence that at the time of the second sale the property was not worth $90,000."

47*th*. That said Circuit Court refused to charge and instruct the jury as requested (fols. 253–315), that "the deeds to the Millikens, carrying out the second sale, which show their privileges and rights, contain no restrictions of any kind, are in consideration of one dollar, and furnish no proof of what they did or did not pay for the property."

48*th*. That said Circuit Court refused to charge and instruct the jury as requested (254–315), that "the title conveyed to the Millikens, being free of all restrictions, is a waiver or discharge of any claim the plaintiff might have, or, at least, an estoppel to this action."

49*th*. That the said Circuit Court refused to charge and instruct the jury as requested (254–315), that "on the whole evidence the defendant is entitled to a verdict."

50*th*. That said Circuit Court did charge the jury (263–316), "If you find that the persons for whom the auctioneers acted were Cummings and Weeks, then this suit having been brought in the name of Cummings alone, and the objection in regard to the nonjoinder of Weeks, as administrator, and his wife, not having been taken by answer in accordance with the rules of justice and pleading or Code of this State, such joinder cannot now be taken advantage of by the defendant, and you may treat the action as if it was properly brought."

51*st*. That said Circuit Court did charge the jury as follows (262–316): "If you find that prior to the commencement of this suit Mr. Walker wrote his name upon this paper as the agent of the seller, and that when this suit was commenced the contract bore upon it, in addition to the name of the defendant, which was affixed to the instrument at the time of sale, the name of Mr. Walker as agent of the seller, then it is competent for the plaintiff to prove by parol evidence for whom the auctioneer acted as agent; and if you find that he acted as agent of the plaintiff, and that the plaintiff was the person for whom the auctioneer was agent in this auction sale, and who is the vendor, then the requirements are sufficiently complied with. If, on the other hand, you find that the name of Walker was not attached to the paper until after the commencement of this suit, which was instituted prior to April, 1872, then, as matter of law, the names of the vendor or vendors do not appear, either expressly or by implication, in the written contract, or in any memoranda

attached thereto, and in that event, if you so find, the contract is fatally defective. The evidence in regard to this is contained in the deposition of Mr. Minot. The counsel for the defendant claim that the deposition of Mr. Minot shows that in May, 1872, after this suit was brought, he examined the contract now before you, and that on that day it did not contain, either upon front or back, the name of Mr. Walker. The counsel for the plaintiff contend that an examination of that deposition shows that the defendant is mistaken in the construction which he places upon it, and that Mr. Minot simply intends to testify that on the 26th of May, 1871, when this contract was broken, as he alleges, it did not contain the name A. R. Walker, but does not swear that he made any subsequent examination after the 26th day of May, 1871. But, according to my view of the law upon this question, in regard to the validity of the contract, it turns upon the fact whether you find that Walker put his name there before the commencement of the suit, or whether you find that he put his name there after the commencement of the suit."

52*d*. That said Circuit Court did charge the jury as follows (266–318): "But, according to my view of the law upon this question, in regard to the validity of the contract, it turns upon the fact whether you find that Walker put his name there before the commencement of the suit, or whether you find that he put his name there after the commencement of the suit."

53*d*. That said Circuit Court charged the jury as follows (270–318): "If you find that the paper Exhibit F was at that time read by the auctioneer, as a part of the terms of sale, then, in my opinion, the deeds tendered are not objectionable, so far forth as they convey a title, subject to the mortgages."

(Exhibit F is at folio 103.)

54*th*. That said Circuit Court charged the jury as follows (271–318): "The action is brought upon the original written contract. The defendant, by one of his pleas, denies that the contract was complied with in the provision requiring an unencumbered title. The plaintiff replies that at the instance of the defendant the compliance with that portion of the contract had been waived, and that at his request deeds were executed subject to the mortgages which he agreed to accept. This reply to the objection that deeds which were called for by the contract were not tendered, it is competent for the plaintiff to make, and if in fact true, is a sufficient excuse for non-performance of the contract in that regard, although the waiver on the part of the defendant was by parol."

55*th*. That said Circuit Court charged the jury as follows (373–319): "That if the defendant had by parol, subsequently to the sale, waived compliance with the contract, such a subsequent waiver by the defendant was a sufficient excuse for a non-performance by the plaintiff."

56*th*. That said Court charged the jury as fol-

lows (277–319): "The rule of damages upon a breach of contract for purchase of real estate is the difference between the contract-price and the salable value of the land at the time of the breach and the expense of the second sale, if second sale there be."

57*th.* That said Circuit Court charged the jury (278–319): "That the expense of the second sale is an element in the rule of damages."

58*th.* That said Circuit Court charged the jury as follows (279, 280–320): "It is said that the second sale was made by the plaintiff as the agent of the defendant, and that plaintiff entered into a private arrangement with the purchaser, Milliken, wherein plaintiff, in the event of the purchase by Milliken, was to become jointly interested with him, and that such private arrangement rendered the second sale void, and destroys its value as an evidence of the damages to which the plaintiff was subject. Now, when the sale is made by an agent or a trustee of the property, the person for whom the trustee or agent acts, cannot be both buyer and seller, and if a private arrangement is made by which the agent becomes interested in the purchase, such sale, whether it is made at auction or is made upon private terms, is voidable at the option of the principal. It is what is called in law constructively fraudulent. But that principle does not apply here in the rigid way in which it is considered applicable to sales by agents. Plaintiff was not, strictly speaking, an agent for defendant, although the sale was a sale on defendant's account."

59*th*. That said Circuit Court did charge the jury as follows (fols. 281–321): "The title had not passed to defendant, and the object and the effect of the sale—that is, the object and effect of the sale so far as we are concerned—is to see what the damages were and what the fair market value of the property was. If the sale was in fact unfair, and the parties in interest did not use all proper means to make it productive, then you are to disregard it, and make deductions from the loss sustained by plaintiff in your estimate of damages; and if they, in point of fact, did all they could, and if, in point of fact, this arrangement with the Millikens enhanced the price which the property brought, the price which the property brought is to be considered by you as an element of importance."

60*th*. That said Circuit Court charged the jury (fols. 284–321): "Add to the actual damages, in regard to the salable value, the amount of the expenses of the second sale, which were somewhere in the neighborhood of $700, and to that add interest to the date of the judgment."

61*st*. That the judgment aforesaid appears to have been given for Stephen H. Cummings, when, by the law of the land, the judgment should have been for the said Joseph Grafton, against the said Stephen H. Cummings; and the said Joseph Grafton prays that the judgment aforesaid, and for the errors in the said record and proceedings being, may be reversed, and that the said Joseph Grafton be restored in all things which he may have lost by reason of the said judgment (fol. 322).

First Point.

The action cannot be maintained. The Statute of Frauds of New Hampshire provides that "no action shall be maintained upon a contract for the sale of land unless the agreement upon which it is brought, or some memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized by writing."

Note: Alabama, Vermont, and Michigan are the only other States which require the authority of the agent to be in writing.

In the paper relied on as the agreement, no vendor is named.

1. The learned Judge charged the jury that, on its face, and as signed by defendant, it was invalid, for that no vendor was named in it.

   This direction was in accordance with all the cases.

   Sherburne *v.* Shaw, 1 N. H., 157.
   Boyce *v.* Green, Batty's R., 608.
   Williams *v.* Lake, 2 E. & E., 349.
   Williams *v.* Rogers, 9 Jurist (N. S.), 363, Privy Council.
   Potter *v.* Duffield, L. R., 18 Eq., 4.
   Champion *v.* Plummer, 1 New R., 252.
   Wain *v.* Warlters, 5 East, 10.

   The learned Judge adverts to this subject fully in the charge, at *fol.* 261, and says: "The only particular in which it is claimed that the written contract which was signed by the de-

fendant is defective, is, that it does not appear from the contract or from any written or printed memoranda therein referred to, who was the vendor of the property purchased by the defendant. Upon the contract now presented to you is the name of A. R. Walker, who was the auctioneer, and who was, at the time of the sale, the agent of both parties. Subsequently to the sale he ceased to be the agent of the defendant, but he still continued to be the agent of the seller. He could not after the sale and execution of the paper by the defendant, affix his name to the contract so as to bind the defendant, but it was competent for him to affix his name so as to bind the seller, and thereby indicate in writing who the seller was.

"If you find that prior to the commencement of this suit Mr. Walker wrote his name upon this paper as the agent of the seller, *and* that *when this suit was commenced*, the contract bore upon it, in addition to the name of the defendant, which was affixed to the instrument at the time of the sale, the name of Mr. Walker as agent for the seller, then it is competent for the plaintiff to prove by parol evidence for whom the auctioneer acted as agent; and if you find that he acted as agent for the plaintiff, and that the plaintiff was the person for whom the auctioneer was agent in this auction sale, and who is the vendor, then the requirements are sufficiently complied with. * * *

"If, on the other hand, you find that the name of Walker was not attached to the paper until after the commencement of this suit,

which was instituted prior to April, 1872, then, as matter of law, the names of the vendor or vendors do not appear, either expressly or by implication, in the written contract, or in any of the memoranda attached thereto; and in that event, if you so find, the contract is fatally defective.

"The evidence in regard to this is contained in the deposition of Mr. Minot. The counsel for the defendant claim that the deposition of Mr. Minot shows that in May, 1872, after this suit was brought, he examined the contract now before you, and that on that day it did not contain either upon front or back the name of Mr. Walker. The counsel for the plaintiff contend that an examination of that deposition shows that the defendant is mistaken in the construction which he places upon it, and that Mr. Minot simply intends to testify that on the 26th of May, 1871, when this contract was broken, as he alleges, it did not contain the name of A. R. Walker, but does not swear that he made any subsequent examination after the 26th day of May, 1871.

"But, according to my view of the law upon this question in regard to the validity of the contract, it turns upon the *fact whether* you find that *Walker put his name there before the commencement of the suit, or* whether you find that he put his name there *after the commencement of the suit.*"

Second Point.

It appearing that the signature of Mr. Walker was not endorsed when Mr. Minot saw the paper (199, 203, 204), there was no evidence as to whether the endorsement was made before or after the commencement of the suit, and the question should not have been submitted to the jury. The *onus* was on the plaintiff to show when the endorsement was made, and there was a complete failure of proof on this point (101).

The Court should have instructed the jury in accordance with the request, that a verdict must be rendered for the defendant (fol. 254).

Third Point.

The learned Judge erred in ruling that it was in the power of Mr. Walker to make the contract valid by endorsing it at any time before the commencement of the suit, which was in March, 1872.

(1.) A period of more than eight months elapsed between the resale of the property and the commencement of the suit. The evidence as to when the endorsement was made by the auctioneer, is contained in the deposition of Mr. Minot (196). It had not been so endorsed on the 26th of May, 1871, when the deeds were tendered (265).

(2.) As auctioneer, Mr. Walker had no power to

bind the parties by his signature, except at the time of the sale.

The rule on this subject is stated by Justice STORY: "It is, for instance, decided that the memorandum of the auctioneer, to bind the purchaser, must be contemporaneous with the sale. It cannot be made afterwards. Now, the statute does not say that the memorandum in writing shall be contemporaneous with the sale. But the courts, upon principles of just policy, have bound up the words by this restriction, in order to prevent men from being ensnared by contracts subsequently reduced to writing by agents."

Smith *v.* Arnold, 5 Mason, 414, 419.
Potter *v.* Duffield, L. R., 18 Eq., 4 (A. D. 1870).

(3.) The proposition of the Court as applied to this case is that, conceding that on the 26th of May, 1871 (the day the deeds were tendered), no binding contract existed, and, also, that when the premises were resold in June, no valid agreement existed, the plaintiff could, by thereafter signing, either in person or by his agent, have the benefit of the tender of the deeds, and hold the defendant responsible for the loss on the resale. No precedent can be found to establish this proposition.

(4.) The authorities cited by the counsel for the defendant in error to establish his proposition that Walker, as agent for the vendors, could have signed this contract on their behalf at any time, so that they would have been liable to an

action thereon, have no bearing upon the question now before the Court. Walker did not do any act for or on behalf of the defendant Grafton; and Grafton is not to be charged by the consequences of any act of Walker in making that valid, which, as to him (Grafton), was previously invalid. The principle of the cases which say that the party may be charged by any writing subscribed by himself, or by his agent, stands upon the proposition that if the party defendant chooses by his own act, or the act of his agent, to make that valid which was invalid before, that he shall be liable and charged thereon. But that is very different from either Cummings or Walker doing an act, the effect of which was to charge Grafton.

The case of Salmon Falls Manufacturing Co. *v.* Goddard, 14 How., 446, is commented on in Browne on Frauds, sec. 375, and the author shows how on its special facts it is saved from conflict with the general rule.

Fourth Point.

The endorsement by Walker did not make an agreement sufficient to enable the plaintiff to maintain the action.

(1.) That endorsement did not indicate who was the seller of the property.

In *Potter* v. *Duffield*, *L. R.*, 18 *Eq.* 4, the bidder at an auction sale required a memorandum acknowledging himself the purchaser of a lot,

stating his payment of his deposit to the auctioneer, &c. On the same day the auctioneer, Beadels, wrote immediately under the vendee's signature, the words "confirmed on behalf of the vendor," and subscribed his own name. It was held by the Court that the term "vendor" was not of itself a sufficient description of one of the contracting parties. The *Master of the Rolls* says, p. 7: "The counsel for the plaintiff contends that you may describe one of the parties as the vendor of the estate; but the statute cannot mean that. It requires the parties to be described in such a manner as that there can be no reasonable dispute as to the person who is selling or buying. I recently held that the description 'proprietor' would be sufficient, there being but one person who answered the description."

In Rossiter *v.* Miller, H. L., 48 L. J. (N. S.), at p. 17, Lord Chancellor Cairns, commenting on the maxim, *Id certum est quod certum reddi potest*, says a writing "I enter into a contract" "on behalf of my client," "on behalf of my principal," "on behalf of my friend," "on behalf of those whom it may concern," has no such certainty, and in none of those cases would the note satisfy the requirement of the Statute of Frauds.

Lord O'Hagan, p. 20: "The parties to a contract in writing must no doubt be specified, but it is not necessary that they be specified by name."

The mere fact that the name of the plaintiff appears in the advertisement of sale (79) as one of whom inquiries could be made, is

not sufficient, and the ruling of the Court in this behalf was correct. A text writer says, "It would seem to be very clear that the mere appearance of the plaintiff's name in the memorandum is not sufficient, if it does not appear as that of the promisee, or party to whom the party is bound, and that such character cannot be affixed by parol evidence to an otherwise ambiguous insertion of the name."

Browne on Stat. of Frauds, § 374.

In the present case, the mention of the name is merely that of one from whom inquiries, &c., could be made.

Fifth Point.

The Court erred in refusing to charge the fifth request (fol. 244), to wit: "Under the evidence in this action, the only agreement on the part of the defendant which the jury can consider, if any, is Exhibit E, No. 1, which was subscribed by the defendant."

(1.) The charge of the Court on this subject, as stated at fol. 269, 270, was as follows: "By the written contract which was signed by defendant, he agreed to comply with the terms of sale as declared by the auctioneer at the time and place of sale, meaning, of course, the written terms so declared.

"The principal point upon which evidence has been submitted to you is, whether two written papers or but one written paper was read by the

auctioneer at the time of the sale. It is contended by the defendant that but one written paper, that one which is annexed to the paper which he signed, was read. It is contended by the plaintiff that the two written memoranda produced upon the trial were read at that time by the auctioneer. The question is not whether the auctioneer announced verbally any condition not contained in any writing, but whether the two written memoranda were, at the time and place of sale, announced by the auctioneer. It is not necessary, as I have said, that the entire terms should be specified upon one paper. The defendant agreed to comply with the written terms as announced at the sale."

"If you find that the paper called Exhibit F was at that time read by the auctioneer as a part of the terms of sale, then, in my opinion, the deeds tendered are not objectionable, so far forth as they convey a title subject to the mortgages."

Paper F is at fol. 103, and is as follows: "There are mortgages on the property amounting to about $51,000. Any amount not already secured by mortgage after the payment of the $20,000 must be made secure to the satisfaction of the seller. The house to be kept open as heretofore."

(2.) The paper F was not signed by either party, and never was in anywise attached to or referred to in the paper E.

See evidence, fol. 155, 156.

The witnesses were at issue as to whether F was read by the auctioneer.

See fol. 180.

Objection was made and exception taken to its being received in evidence—

1st. On the ground that the paper E, which was subscribed by the defendant, specified the terms and conditions of the sale.

2d. That there was no connection shown on the face of the papers between the paper F and the paper signed by defendant.

3d. Irrelevant, &c.

(3.) It will be observed that paper F contains two features not contained in the paper signed by the defendant.

1st, As to mortgages;

2d, "The house to be kept open as heretofore."

Both of these features were material, creating an incumbrance of the property, limiting its use and enjoyment to that of a hotel, and binding the purchaser to keep the house open, probably for the benefit of the purchasers of the stage route.

(4.) At fol. 244, 6th request, "The paper F did not form any part of the contract between the parties, and cannot be regarded or considered by the jury," was refused, and exception noted.

The terms and conditions of sale were declared in paper E (fol. 77). The reference was satisfied by the terms and conditions in E. The rules on this subject are carefully stated in a recent decision by the Supreme Court of New Jersey: "It is not essential that the whole bargain be contained in one memorandum. It will be sufficient to satisfy

the statute if its terms can be gathered from two or more detached papers, if the signed memorandum contains such reference to the other papers as to make the latter part of the former. The connection between the signed and the unsigned papers cannot be made by parol evidence that they were actually intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred. The connection between them must appear by internal evidence derived from the signed memorandum. Parol testimony will be received only for the purpose of interpretation or explanation, where technical terms are employed, or to identify papers which by a reference to the signed memoranda are made parts of it"

Johnson *v.* Miller, 35 N. J. L. R., 344.
Boydell *v.* Drummond, 11 East., 142.
Coles *v.* Trecothuch, 9 Ves., 250.
Clunan *v.* Cooke, 1 Sch. & Lef., 22.
Parkhurst *v.* Van Cortlandt, 1 Johns. Chy., 273.
1 Smith's Lg. Cases, 465; Notes to Birckmyr *v.* Darnell.
Dobell *v.* Hutchinson, 3 A. & E., 355.
First Bap. Ch. *v.* Bigelow, 16 Wend., 28–31.
O'Donnelly *v.* Seeman, 43 Maine, 158.
Peek *v.* North Staffordshire R. R. Co., 10 H. L. Cases, 472.
Knox *v.* King, 36 Alabama, 367.

In Beckwith *v.* Talbot, 95 U. S., 389, the plaintiff proved a contract which on its face

showed it was made between plaintiff and defendant as contracting parties. It was conceded by both parties that this was the agreement under which the services of the plaintiff were performed. The Court say: "His letters were a clear recognition of it. * * What agreement could he possibly refer to, but the only one which, so far as appears, was ever made; the one which he took into his possession; the one under which it was conceded the parties were then acting?" On such *concessions* that this was the contract under which the parties had acted, and no other being shown, the Court regarded the reference in the letters to the agreement sued on as established. But the Court, applying the general rule above quoted to the evidence, says, "There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. *If there is ground for any doubt in the matter, the general rule should be enforced.*"

(5.) The declarations of the auctioneer were not admissible to establish this paper.

(6.) Conditions of sale read before the biddings commenced, but not annexed to the catalogue on which the purchasers' names were entered, or referred to therein, cannot be referred to supply the terms of sale omitted in the catalogue.

Hinde *v.* Whitehouse, 7 East, 558.
Kenworthy *v.* Scofield, 2 B. & C., 945.

(7.) Handbills and newspaper notices, published at the time of sale and there circulated, not admissible, the signed memorandum containing no reference to them.

O'Donnell *v.* Leeman, 43 Maine, 158.
First Bap. Church *v.* Bigelow, 16 Wend., 28, 31.
Wright *v.* Weeks, 25 N. Y., 153.
Riley *v.* Farnsworth, 116 Mass., 223.

(8.) The brief of defendant in error (p. 8) claims that these declarations were admissible, because the auctioneer is the agent of seller and purchaser, so that his acts and declarations are competent. He is not the agent of the purchaser until the premises are struck down, and his agency is limited to then and there signing the contract.

Sixth Point.

By the terms of sale the defendant was entitled to a fee simple, free of all incumbrances (250). The deed covenanted that the premises were free from incumbrances. The defendant proved that mortgage incumbrances existed, exceeding $50,000.

The Court charged, that if Exhibit F was not a part of the conditions of the sale, the defendant was entitled to a deed in fee simple, unless the condition was waived by defendant.

Exception (250).

1. Exhibit F was not a part of the conditions of sale.

2. The condition was not waived.

When the deeds were tendered, it was made a specific objection "that there were mortgages now on the estate outstanding" (92).

3. The Court admitted evidence of conversations about the mortgages prior to and at the time of the sale; but the bill of exceptions states that this was only allowed "for the purpose of showing that the alleged reason of the defendant for refusing to accept the deeds was a fictitious reason, and that his assertion that he did not know about the mortgages was untrue."

This was immaterial.

4. There was no competent evidence of waiver (157, 166), or any alteration of the written contract, by which the defendant agreed to accept a deed with mortgage incumbrances on the property, nor any consideration for such new contract.

5. A contract, as originally entered into, cannot at law be altered by evidence of a parol variation in favor of either plaintiff or defendant.

Dart on Vendors, 451.
Sugden on Vendors, 171.
Goss *v.* Nugent, 2 Nev. & Man., 33.
Emmet *v.* Dewhurst, 8 Eng. L. and Eq., 88.
Blood *v.* Goodrich, 9 Wend., 68, 78.
Sanderson *v.* Graves, L. R., 10 Eq., 234.

6. The Courts allow a parol waiver of a contract required by the Statute of Frauds to be pleaded in defence where it is a waiver of the whole contract, but not where the effect of the waiver is to substitnte for the original contract a new one.

Goss *v.* Nugent, 5 B. & Ad., 58.
Sanderson *v.* Graves, L. R., 10 Excheq., 237.

Seventh Point.

The deeds tendered were not in accordance with the conditions of the sale as to the staging.

Conditions, fol. 77.
Deed, fol. 85.
Exception, fol. 249.

1. The terms of sale were limited to the *stage route* and *stages*—the deed added to this, the *livery and stable* business of the house.

2. The plaintiff was allowed to prove the explanation given by auctioneer at the time of the sale (104–105), as to what was meant in regard to the condition of the sale of the staging. That explanation did not embrace anything but staging.

3. Livery and stable business of a hotel of this character, cannot be classed as "staging." Railroads may destroy much of the business of

staging, while the "livery and stable business" remains a profitable and substantial feature.

4. The plaintiff proved that one of the grounds of refusal of defendant to accept the deeds was "because of the conditions in the papers now tendered, which are not in accordance with the terms stated on the sale" (92).

Eighth Point.

The real estate was not partnership property, and plaintiff as surviving partner did not have power or authority to sell or dispose of it.

1. It was not purchased with partnership funds.

2. It was not held in the joint names of the partners.

3. The mere fact that the land of the tenants in common was used in carrying on hotel business in which they were partners, did not change the character of the title by which each held his share of the real estate.

Thompson *v.* Bowman, 6 Wall., 317.

4. An original contribution or appropriation of real estate by one partner to partnership or capital stock, cannot be made by parol or otherwise than by a conveyance or covenant, in such form as to operate a conversion of such

property to such stock or capital, and charge it with a trust to the use of the partnership.

Frink *v.* Branch, 16 Com., 261.

1 Amer. Lg. Cases, Eq., 5th edition, p. 61, 155, 605, 606.

Deloney *v.* Hutchinson, 2 Randolph, 183, 187.

Bird *v.* Morrison, 12 Wis., 153.

5. J. M. Thompson had individual creditors. Defendant Grafton was his creditor to the extent of $9,000.

Ninth Point.

Two-thirds of the property in this real estate belonged to the estate of J. M. Thompson. If the sale was made on the part of the plaintiff and Weeks, the administrator, this action cannot be maintained by the plaintiff alone.

(1.) The rule is laid down in *Charter* vs. *Leese*, 4 *M. & W.*, 295, that "if the objection does not appear on the pleadings, and the action proceeds to trial with the wrong parties as plaintiffs, upon an issue traversing the contract, there would appear to be a variance between the contract made in fact and alleged in the declaration, which, unless amended, would be ground of nonsuit or adverse verdict."

So in *Graham's Prac.*, 91, "where there are several jointly interested in a contract, they

must all join as plaintiffs." And at page 93: "As a general rule, the non-joinder of the plaintiffs in actions *ex contractu* may be either taken advantage of by pleading in abatement, or the defendant may avail himself of it on the general issue, as a ground of nonsuit at the trial, or, if the defect appear upon the pleadings, may demur or move in arrest of judgment, or bring a writ of error."

The parties framed the pleadings in this action according to the common law forms in use at the time the suit was commenced. The pleas were filed in April, 1872. The Act of June 1st, 1872, now 914 of Revised Statutes, was not retroactive.

Tenth Point.

The deed tendered as executed by the administrator of Weeks did not confer or grant any title to the real estate.

(1.) The power of an administrator to sell real estate being statutory, the requirements of the statute must be strictly complied with.

Gen. Stat. New Hamp., Ch. 182, Ed. 1867

(2.) Chapter 182 of the Laws of New Hampshire provides as follows:

"SEC. 1. The Judge of Probate, on application of the administrator, may grant license for the sale of the real estate of any person deceased, or of lands

purchased or set off to the administrator in payment of debts due to the estate, when the personal property shall be insufficient to pay the just demands by law chargeable to the estate.

"SEC. 2. Such license may extend to the reversion of the homestead and widow's dower, or to any interest in land whatever; but any other estate, except a present fee, shall be particularly specified in the application notice and license.

"SEC. 3. If the real estate is so situate that a part thereof cannot be sold without injury to the persons interested therein, license may, on application, be granted to sell the whole, though it may be more than sufficient for the payment of said demands."

"SEC. 5. The Judge, in the license, shall fix the sum of money to be raised by the sale, and may, when he deems it expedient, specify the tracts or parcels to be sold."

"SEC. 7. The Judge, either before or after any license to sell real estate is granted, may require from the administrator a bond, with sufficient sureties, to account for the proceeds of the sale, in such manner as the Judge shall order."

"SEC. 9. Every such sale shall be made at auction, and the administrator so authorized and sworn, and having so advertised and sold, may execute and deliver a valid conveyance of the estate sold to the purchaser."

"SEC. 15. When it shall be necessary to sell real estate for the payment of debts, the Judge, on application of the administrator, with the assent of the widow, if any, may grant license for the sale of the whole real estate of the deceased, including the

homestead and the widow's dower, and the reversions thereof."

See Heywood, 208; *Whidden*, 130 *and* 217.

(3.) The license granted by the Judge of Probate was in accordance and in harmony with the statute.

(4.) The administrator did not sell the two-thirds.

Eleventh Point.

The administrator Weeks could not adopt as his own a sale at auction by another party, having and representing in the sale a distinct interest in the property, and the Court erred in refusing to so charge.

Fols. 247, 311.

1. The statute of New Hampshire does not require or provide for any confirmation of the sale by the Surrogate on the proceedings being reported to him. The party who buys must see to it that the sale is under and in accordance with the terms of the license.

2. The administrator could not sell the real estate subject to the encumbrances or the conditions imposed for the benefit of the proprietors of the stage route.

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Twelfth Point.

Evidence as to the amount the property produced at the second sale should not have been submitted to the jury on the subject of damages.

The proof was undisputed that prior to this second sale the plaintiff had made an arrangement with Milliken, to whom the property was struck off at the second sale (125, 126), which was reduced to writing after the sale (fols. 226 to 230), the plaintiff to make one-half of the payments.

The learned Judge charged that "if, in point of fact, the parties in interest at the sale did all they could, and the arrangement with the Millikens enhanced the price which the property brought, then the price which the property brought is to be considered by you, and is to be taken by you as an element of importance" (fol. 282).

There was no evidence from which the jury could infer that the arrangement with the Millikens enhanced the price produced, except they were the highest bidders.

The influence of such arrangement on the conduct of the party who assumes the double character of seller and purchaser, is so subtle and dangerous that the law will not allow him to derive any benefit from the transaction.

It was the duty of the plaintiff to obtain the highest price for the property; it was his interest to have it sold at the lowest possible price. This interest was arrayed against duty.

Is it right that he should have the benefit of his own alleged act, and breach of duty toward defendand, to create evidence which shall bear upon the measure of damages he may recover from defendant?

Hoitt *v.* Webb, 36 N. H., 158, 163.

Ex parte Bennett, 10 Ves., 381.

Thirteenth Point.

The auction sale did not furnish any measure of damages.

1. By reason of the fact that the plaintiff acted in the double relation of vendor and vendee.

2. Because the whole of the property was not actually sold, but only that portion which belonged to the estate of J. M. Thompson.

3. Because the second sale was made under clear and express conditions, which bound the purchaser to keep that house open as theretofore.

4. Because no right to resell had been reserved in the terms of the original sale.

5. Because there was no evidence of the value of the premises free from the conditions as to the house being kept open.

Fourteenth Point.

The Court erred in admitting in evidence the letter from Judge Davis to plaintiff (fol. 238). It was, so far as appears, wholly unauthorized by defendant, and he never knew of its existence. It was calculated to have a strong influence with the jury adversely to defendant.

Judge Davis had not been a witness in the cause,

and was not living at the time of the trial. So far as he had any relations to defendant after the sale, it was simply to examine the title (190).

Fifteenth Point.

The declarations of Mr. Minot at the time he attended the second sale should not have been admitted against defendant (118, 119, 120). He was not defendant's agent in the transaction. The evidence of defendant was clear on this point (fol. 187): 'I did not instruct or say anything to Mr. Minot about going up to the sale. He went on his own account. He was not my agent. I had nothing to do with him in the matter." Mr. Minot testified (fols. 201, 202) that he did not in any way represent or act for the defendant at the second sale. Mr. Minot's authority from defendant was limited to the action in regard to the rejection of the deeds in Boston, where he lived.

The evidence was admitted, absolutely subject to a statement of the presiding Judge, that if it appeared thereafter that Mr. Minot acted without authority of the defendant, it would be ruled out and the jury instructed in that regard, and the defendant excepted. The learned Judge did not thereafter instruct the jury to disregard the evidence or rule it out.

Again, at folio 160, counsel for the defendant objected to evidence of Mr. Minot's declaration at the second sale, on the ground that there was no evidence that Mr. Minot was the agent of defendant at

that sale, or had any authority to represent him or act for him thereat, and that the same was irrelevant, immaterial and incompetent. The objection was overruled by the presiding Judge, who said he would give proper instructions thereafter with reference to the testimony, and the evidence was allowed and defendant excepted.

The admission of improper evidence is not cured by a remark of the presiding Judge that he will thereafter give proper instructions to the jury.

Sixteenth Point.

The question put to the witness Thompson, at folio 233, "Can you state what made the difference in the price received for the same property on the 16th of May, and on the second sale on or about the 9th of June?" was incompetent and improper.

1. It was not a matter upon which the plaintiff was entitled to have the opinion of a witness.

Seventeenth Point.

The Court erred in the instructions to the jury that they should add to the "actual damages in regard to the salable value, the amount of the expenses of the second sale, which were somewhere in the neighborhood of $700" (fol. 284).

The only evidence on this subject is set forth at

folios 175 and 176, in which it is stated by the witness "that he did not see any of the commissions paid to the auctioneer—that all he knew about it was that in a settlement between plaintiff and himself he allowed him so much as paid for commissions."

This was not competent evidence on which the jury could base a verdict.

Eighteenth Point.

The remedy of the plaintiff was limited to the $5,000 which the terms of sale provided should be forfeited on the failure to complete, or to the filing of a bill for specific performance. The resale cut off his right of action for specific performance.

Nineteenth Point.

The admission of the oral declarations before and at the time of the sale should not have been admitted. It was immaterial whether the defendant did or did not know of the mortgages at the time of the sale. Were they or were they not embraced in the written agreement? was the only question which could be raised about them. The Court allowed the false issue to be raised, based on these declarations of good or bad faith on part of defendant in refusing to accept the deeds. It was well calculated to mislead the jury, and necessarily had a preju-

dicial effect on their minds on what the Court deemed it proper to submit to them as the main issue.

Twentieth Point.

As to each item of evidence objected to on the part of defendant, the Court erred in admitting it. The reasons have been stated under the preceding points.

Twenty-first Point.

The Court, as to each of the requests made which were refused, erred in such refusal.

Twenty-Second Point.

The exceptions should be sustained, and a new trial granted.

A. J. VANDERPOEL,
JAMES W. GERARD,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCT. TR., 1878, No. 179.

JOSEPH GRAFTON, PLAINTIFF IN ERROR,

VS.

STEPHEN H. CUMMINGS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

Quimby, Printer, Lancaster, N. H.

SUPREME COURT OF THE UNITED STATES.

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VS.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT.

This action was commenced by the defendant in error in said Circuit Court, on the 14th day of March, 1872, to recover damages of the said Joseph Grafton for not performing a contract of purchase of the property known as the Glen House, situate in Green's Grant, Coos County, N. H. Upon the trial it appeared that said Stephen H. Cummings, some time in 1867, entered into partnership with Joseph M. Thompson, under the style of J. M. Thompson & Co., in the hotel business, and said Joseph M. Thompson then conveyed to said Stephen H. Cummings one undivided third part of the real estate belonging to said Glen House, and one-third of the personal property, and they continued in said hotel business under said partnership, occupying said

Glen House property until 1869, when said Thompson died. The one-third of the property standing in the name of Cummings, was purchased by him of Mr. Thompson with his own individual funds, under an agreement that Cummings and Thompson should form said partnership, and during the time that the partnership was continued said property was used and treated as partnership property in which the interest of Mr. Thompson was two-thirds and the interest of Mr. Cummings was one-third, and they were to share the profits and losses in the partnership business in the same proportion.

On the death of Mr. Thompson said Stephen H. Cummings, as surviving partner, took possession of said partnership property and undertook to liquidate the co-partnership business, giving a bond for that purpose to James W. Weeks, the administrator of J. M. Thompson, under the provisions of Sec. 4 to 6 inclusive, of Ch. 106 of the Gen. St. of N. H. (See pp. 26 and 27 of the transcript.)

To enable the surviving partner to close up the affairs of the partnership and to account to the administrator — as he stood bound to do under the law referred to and by the terms of the bond given by him — "for the deceased partner's share of the partnership property as might of right belong to the estate of the deceased after payment of the debts of the co-partnership and the necessary expenses of adjusting the same." (See bond on p. 27 of the transcript.) He published notices for a sale of the said real estate on the 16th day of May, 1871, set forth in the transcript, p. 22.

On said day of sale the auctioneer, A. R. Walker, announced the terms of the sale as stated upon the margin of plaintiff's Ex., E. No. 1, p. 21, and also read the paper marked plaintiff's Ex., F. No. 6, to-wit: "There are mortgages on the property amounting to $51,000. Any amount not already secured by mortgage after payment of twenty thousand dollars, must be made secure to the satisfaction of the seller. The house to be kept open as heretofore." [p. 29 of the transcript.] It appears by the plaintiff's evidence on the trial below that there were mortgages out standing upon the real estate amounting to about the sum of $51,000 and this fact was fully talked over and understood with the defendant below, Joseph Grafton, both before and after the sale, between him and Mr. Cummings, Mr. Weeks, the administrator, and their attorney. Mr. Grafton appeared at

said sale and he being the highest bidder the said real estate and furniture were struck off to him at the sum of $90,000, and thereupon he signed the paper marked plaintiff's Ex., E. No. 1, (p. 21, transcript.) to this paper were annexed the advertisements set forth on p. 22.

He being a large creditor of the estate of J. M. Thompson, the $5000 on the spot was not required of him, and in place of that he was allowed to give Mr. Weeks the due bill for that amount, found on p. 43 of the transcript, which he also signed.

When the contract signed by Mr. Grafton was introduced in evidence (plaintiff's Ex., E. No. 1.) there was upon it the following indorsement: "A. R. Walker, auctioneer and agent for both parties." Upon the instructions of the Presiding Judge, it is settled by the verdict that this indorsement was made prior to the commencement of this suit. (See the charge upon this point; p. 68 of the transcript.)

At the time of the sale, and after the plaintiff in error had become the purchaser, it was agreed by him that he would take the title subject to the pre-existing mortgages, and on the 26th day of May, 1872, the deeds then agreed upon were tendered to Mr. Grafton, which he refused to accept, "because of the conditions in the papers now tendered which are not in accordance with the terms stated on the sale, because of the mortgages now on the estate now out standing, and because the title is otherwise not satisfactory."

And thereupon the same property was again advertised to be sold, on account of Capt. Grafton, and on the 9th day of June, 1871, it was again sold, to Mr. Milliken for $61,000, upon the same terms as it had previously been sold to said Grafton.

Upon the charge and verdict the claim of the plaintiff in error, that there was any collusion or fraud in this second sale, is excluded. Under the instructions of the Presiding Judge the jury returned a verdict in favor of the plaintiff below.

In our statement of any fact deduced from the evidence, we have intended to state it as it must have been found by the jury, under the instructions to them.

Was there error in the instructions of the Presiding Judge upon the question arising under the statute of frauds? We claim that there was none that the plaintiff in error can avail himself of. It is well settled that the auctioneer in making the sale may act as the agent of both parties.

Brown on Frauds, Sec. 369.

The entries of brokers and auctioneers upon this ground are always treated as a sufficient memorandum of the contract, where such entries contain the necessary elements of the contract.

In our case the name of Stephen H. Cummings appears in the advertisement together with that of James W. Weeks. This advertisement is annexed to the memorandum signed by Capt. Grafton, and is therein referred to, and the memorandum is endorsed by A. R. Walker, auctioneer and agent for both parties. We say this memorandum contains all the elements of the contract that can be required under the Statute.

It is signed by Joseph Grafton, the party sought to be held; the consideration is fully stated: the property sold is sufficiently described, and the sellers names appear, to-wit: Stephen H. Cummings and James W. Weeks.

Contracts of this nature, as well as all others, are to be construed in view of the surrounding circumstances, and under this rule it was proper for the plaintiff below to show that he was the surviving partner of said Joseph M. Thompson; that the property offered for sale was the partnership property of said J. M. Thompson & Co.; that by the terms of the Statute of New Hampshire he had the right to the possession of said partnership property for the purpose of closing up the affairs of the partnership; that he had taken said partnership property into his hands under the provisions of said Statute. These facts in connection with the contract signed by the defendant below, show how Mr. Cummings's name came to appear in the contract, (the advertisement being made a part of that instrument,) and who the vender was, for whom the auctioneer signed as agent, that party's name appearing in the memorandum, as before shown.

And these facts further show that the right of action upon this contract is in Mr. Cummings, the surviving partner of J. M. Thompson; that James W. Weeks's name appeared in said proceeding only for the purpose of transferring the legal title to two-thirds of the real estate.

To constitute a signing of the memorandum within the meaning of the Statute it is not necessary that it should be signed at the bottom, but if the party to be charged insert his name in the body of the paper it is sufficient.

Hawkins vs. Clace, 19 Pick., 505.

And it is now well settled as a rule applicable to all simple contracts in writing, signed by an agent, that the instrument in order to bind the principal need not be executed in the name of the principal or as his act. It is sufficient if, from the terms and scope of the contract, it appears that the party signing acts as agent in so doing with intent to bind the principal.

Rice vs. Grove, 22 Pick., 158.

It would seem a strange rule to us that the party to be charged may thus be shown by the signature of the agent, and that the vendor's name may not be shown in the same manner. See Sec. 364, Brown on Frauds.

It seems to us that the case of Sal. Falls Manf. Co. vs. Goddard, 14 How., 246, is conclusive upon this point, where it was held that it was competent to show that Mason signed for the firm of Mason & Lawrance, and that house was acting as agent for the plaintiffs, and in that way the sellers name was shown in the memorandum relied upon in that case, which is carrying the rule far beyond any thing claimed by us. That case arose upon the Mass. Statute in relation to the sale of goods. The Statute of N. H., under which our case comes up is in every material particular the same as the Mass. Statute. It is G. St. of N. H., Ch. 101, Sec. 12. "No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought or some memorandum thereof is in writing, and signed *by the party to be charged*, or by some person *by him* thereto authorized by writing." On the trial below the original defendant relied upon the case of Shurban et al vs. Shaw, 1 N. H., 157. If that decision was ever sound law it can have no application to our case; first because the memorandum here was not defective, as the one relied upon there was. In our case the memorandum in fact showing the names of Mr. Cummings and Mr. Weeks the vendors, and it distinctly appearing that Walker, the auctioneer, signed for them.

Second, the Statute upon which Shurburn vs. Shaw was decided has been changed to the present form, and that change takes away all foundation for that decision. That

Statute was, "No action shall hereafter be maintained upon any contract or sale of lands, * * * * unless the agreement upon which such action shall be brought or some memorandum thereof be in writing and signed by the *parties* to be charged therewith, or signed by some other person *thereto lawfully authorized* in writing." Under this Statute there may be some ground to uphold the decision in Shurburn vs. Shaw, but we question its ever being the correct rule. See Sec. 365, Brown on Frauds. At any rate that case has no application to our present Statute.

Penneman vs. Hartshorn, 13 Mass., 87.
Whidden vs. Bacon, 2 Gray, 387.
Howe vs. Deering, 2 Gray, 476.

The cases of Learned vs. Wannemacher, 9 Allen, 412, and Learned vs. Jones, ib. 419, are directly in point.

Coddington vs. Goddard, 16 Gray, 436.

The case of Gowen vs. Klouse, 101 Mass., 449, is upon a contract of the same form as that in the case at bar, and in our view is in all respects a parallel case with this.

Hunter vs. Geddings, 97 Mass., 41.

It will be born in mind that the objection to the contract is not that the defendant did not himself sign the memorandum so as to be bound thereby, but that the instrument does not disclose the name of the purchaser. Now we claim that the name of the purchaser is sufficiently disclosed upon the face of the contract without any reference to the indorsement thereon of the name of the auctioneer, and therefore the exceptions to the charge in that respect fall to the ground.

We farther contend that the auctioneer was the agent of the vendors, so far that he could at any time previous to the commencement of this suit make or complete a sufficient memorandum of this contract. His authority as agent of the vendors had never in any manner been revoked, and if his authority had been in writing he could have signed this contract on behalf of the vendors so that they would have been liable to an action thereon.

Learned vs. Wannemacher, 9 Allen, p. 416.
Sanborn vs. Chamberlin, 101 Mass., p. 416.
Savewright vs. Archibald, 1 Langdell select cases, 452, 7 Q. B., 103.
Williams vs. Bacon, 2 Gray, 387.

The Statute of N. H. recited on pp. 26 and 27 of the transcript was introduced in connection with the evidence showing that this property both real and personal had been used and treated as partnership property, and that the plaintiff below had taken possession thereof as surviving partner in order to prove that the right of action was in Stephen H. Cummings, and therefore said Statute was not immaterial and irrelevant.

This Statute, together with the plaintiff's evidence offered in connection therewith, conclusively shows that the right of action was in said Stephen H. Cummings, and the objection of the defendant below on account of the non-joinder of James W. Weeks would not prevail if that objection had been taken in the answer. And it certainly can not prevail, the said defendant not having taken the objection in his answer. Daniel, et al vs. Walsh, et al, 33 N. Y. 43, for defect arising from non-joinder of plaintiff, advantage can only be taken under the order by answer of demurrer.

The evidence of the plaintiff below in relation to the mortgages upon the real estate was not in any manner introduced to vary the terms of the written contract, but to show that Capt. Grafton had full knowledge of the condition of the title and assented to waive any right he had under the contract to a conveyance free from the mortgages. We say that it appears from the whole evidence upon this subject together with the verdict rendered under the instruction of the court, that the claim of Capt. Grafton, that he declined to

take the deeds tendered and complete the contract, was a pretext upon his part.

It appears from the evidance that this matter of the mortgages upon the real estate was a subject of discussion from the time he was on his way from Portland to attend the sale, till after the sale was completed, and it was agreed what deeds should be executed and delivered to him. And all this evidence tends to show just what is claimed on the part of Cummings, that this excuse on Grafton's part is a mere pretext.

The instrument signed by Capt. Grafton refers to "The terms and conditions of the sale as declared by the auctioneer at the time and place of sale," and he binds himself, his heirs and assignees to comply with said terms and conditions.

The paper marked plaintiff Ex. F., No. 6, read by the auctioneer at the time of the sale as terms of the sale shows conclusively that the amount of the mortgages was ascertained, and announced to the bidders present, and it shows further that the purchaser might pay twenty thousand dollars, (five thousand on the spot and fifteen thousand on delivery of the deed,) allow the mortgages then upon the property to remain, and secure the balance of the purchase money. The expression contained in this paper, "Any amount not already secured by mortgage, after the payment of the twenty thousand dollars must be secured to the satisfaction of the seller," can have no other meaning. In this connection we claim that the declaration of the auctioneer as to these terms of the sale made at the time were properly admitted in evidence. The evidence of declarations that the purchaser could arrange to continue the prior mortgage was particularly material in this connection.

We claim that these declarations are admissable as part of the *res gestæ*; they were made at the time of the act in question and as part thereof. 1 Greenleaf Ev., Sec. 108-110, and all the authorities agree that the auctioneer acts as agent of both seller and purchaser, therefore his acts and declarations made at the time of the sale are admissable, ib. Sec. 113.

The instructions of the presiding Judge in relation to the paper marked "Exhibit F." were correct as before shown; the instruments signed by Grafton refers to the terms and conditions of sale as declared by the auctioneer; the verdict under the instructions finds that said paper was read by the

auctioneer at the sale as part of the terms thereof. And other evidence on the part of the original plaintiff shows that the defendant below elected to accept the deeds subject to the prior mortgages. This fully disposes of the objection that the deeds tendered were made subject to the prior mortgages.

See Sec. 350, Brown on Frauds. Also Sec.'s 352-3.
Sal. Falls Manf. Co. vs. Goddard, 14 How., 446.
Beckwith vs. Talbot, 95 U. S., 289,

is a case strongly in point.

Seavewright vs. Archibald, 17 Queen Ben., 103.
S. C. 1 Langdell, select cases on sales, 452.
Sanderson vs. Jackson, 2 Bousauquet & Fuller, 238.
Phillmore et al vs. Berry et al, 1 Campbell, 513.
Allen vs. Bennett, 2 Taunton, 169.
Jackson vs. Lowe, 1 Bingham, 9.

The evidence of the reading of "Ex. F." in the presence of plaintiff in error and subsequent bid by him was material to show his assent to the terms of the contract contained in said paper, "F."

Abbott vs. Shepard, 48 N. H., 14.

The parties could not be held to said contract without showing that they mutually assented to it.

If there is any error in the instructions of the court in relation to said paper marked "Ex. F," and the plaintiff below could only recover upon the contract as shown by the instruments signed by Capt. Grafton, we say the verdict should not be set aside because he waived his right to an unincumbered title subsequent to his signing that instrument.

It is a strange proposition for the plaintiff in error to assume that we can not show that the deeds tendered were just such as he assented to, and requested should be made in this respect, i. e., is subject to the prior mortgages.

The doctrine of estoppel *in pais* would apply to him in full force, and in all justice under such a state of facts.

Davis vs. Saunders, 11 N. H., 259.
Guernsey vs. Edwards, 26 N. H., 224.
Erwin vs. Lowry, 7 How., 172.
P. W. & B. R. R. Co. vs. Howard, 13 How., 317.
Horn vs. Cole, 51 N. H., 287.

And the plaintiff in error waived his right to an unincumbered title if such was the contract.

Burnham vs. Goffstown & Danbarton, 50 N. H., 560.
Pierce vs. Ins. Co., 50 N. H., 297.
Jenness vs. Wendell, 51 N. H., 62.
Peckett vs. Bullock, 52 N. H., 314.
Cheshire Prov. Inst. vs. Stone, ib., 365.

The instrument signed by Capt. Grafton with the papers annexed show all the material parts of this contract. This we claim to be true without any reference to the indorsement by the auctioneer, or the paper marked F.

The property sold is fully described, the price stated, terms of payment specified, the memorandum is signed by the party sought to be charged, and as we claim it shows the names of the sellers.

It is sufficient if the memorandum taken in connection with the evidence of the surrounding circumstance shows the seller. In the advertisement the names of James W. Weeks and S. H. Cummings appear, and the evidence properly admitted show them to be the sellers of the property.

Newell vs. Redford, 3 Com. Pleas, 52.
Beckwith vs. Talbot, 95 U. S., 289.

In this view of the case the paper marked F was properly admitted in evidence bearing on the question of a waiver of his right by Grafton to an conveyance of an unincumbered title together with the evidence that it was read by the auctioneer.

The terms of the deed tendered in relation to the stage route, stages, etc., do not differ from those terms as stated in the memorandum of the sale. "The mountain route" named in the deed is one of the stage routes mentioned in the memorandum, and the "horses and carriages" mention-

ed in the deed was the stage property referred to in the memorandum, and the "staging, livery and stable busines of said house" specified in the deed is the exclusive business of the house, which the memorandum refers too. See the evidence of S. H. Cummings on p. 29.

The attention of the court is here called to the fact that Mr. Minot was informed by Mr. Cummings that he would make any alterations in the deeds if they were not satisfactory, and Minot said he did not want any alterations, and the evidence shows that Minot was then authorized to represent Grafton in this matter. See page 30.

After what then transpired between Mr. Cummings and Mr. Grafton, and Mr. Cummings and Mr. Minot acting for Grafton, we claim that the latter is barred from making objections to the deeds tendered.

The objection of the plaintiff in error that the deed tendered; executed by the administrator, did not confer or grant any title to the real estate does not show what the nature of the objection is, sufficiently to be the basis of an exception.

The objections that the administrator did not sell at public auction, and that the sale made was not authorized by the license have no foundation in fact.

The fact that the surviving partner and administrator in the sale of the real estate made a provision for a sale of the staging property does not create any easement in violation of the Statute or the license. See deposition of B. F. Whidden, p. 57.

The plaintiff in error having failed to fulfill his contract the surviving partner and administrator might re-sell the property, and their proceedings in said re-sale were properly admitted in evidence to show the manner it was made, whether fair or otherwise, on the question of damages.

The costs of the second sale have wholly occurred on account of Capt. Grafton's neglect to perform his contract are a legitimate item of damages in this suit.

Sedgwick on Damages, 318.

The judge correctly charged the jury that they might properly take into consideration the fact that the second sale was made after the time it was necessary to make preparation for opening this Hotel. This court can see that the administrator and Mr. Cummings immediately proceeded to advertise the second sale after Capt. Grafton refused to per-

form his contract. That refusal occurred in Boston on the 26th of May, 1871, and on the 29th of the same month Mr. Weeks and Mr. Cummings advertised the property for re-sale, the earliest day they could get together for that purpose, so no laches are chargable upon them.

And any depreciation of the value on account of the late day of the second sale is directly chargable upon Mr. Grafton. Sedgwick on dam., 65–6, citing Armstrong vs. Percy, 5 Wend. 535.

The proposition in the charge that the measure of damages upon a breach of this contract, is the difference between the contract price and the saleable value of the land at the time of the breach, is correct.

Hopkins vs. Lee, 6 Wheat., 109.

The proposition that Mr. Cummings acted as the agent of Mr. Grafton in making the re-sale has no foundation and the evidence shows that the proposition of Mr. Milliken that Cummings should subsequently become his partner in carrying on the business did not in any manner effect the sale to the Millikens. See p. 35.

The vendors having the right to make a re-sale of the property after Mr. Grafton had declined to execute his contract. (See Sedgwick, 318.) It cannot be true that the plaintiff below is estopped by his deed to the Millikens as is now claimed.

The witness, Charles Soule, was properly allowed to read his memorandum of what occurred in the office of A. R. Walker. He testifies to the memorandum being correct and has forgotten the transactions so that he could not testify from memory, pp. 35–6. See N. H. cases on this subject in Morrisons digest, p. 648–9. 1 Green Ev. Sec's. 436, 7, 8 and 9.

We think that the evidence of Mr. Soule cannot be considered immaterial when it so clearly shows that Mr. Grafton's reasons for not fulfilling the contract of purchase as now given by him were not the true reasons.

This evidence is intimately connected with the letter of Judge Woodbury shown in the evidence of Nathan Cum-

mings on p. 62, and it further tends to show that Mr. Minot was in fact acting for and was the agent of Grafton in all he, Minot, did in these matters. This evidence conclusively sustains Mr. Cummings in relation to what occurred at that time, and directly contrdicts Mr. Grafton in his narrative of those transactions.

The evidence of Mr. Soule and Mr. Cummings as we claim, show Minot the agent of Grafton, and therefore what Minot did at the second sale was properly admitted in evidence. See p. 33.

We claim that it is conclusively shown that Mr. Grafton had full notice of the second sale, was represented at said sale and by his agent then bid upon the property.

The bill of exceptions show that there is no ground for the assignment of error that Mr. Heywood was allowed to state the result of the discussion about the mortgages, on p. 45. It appears that the witness had then occupied considerable time in detailing the conversation, and had gone over the conversation substantially before the court directed the witness to state the result of the discussion.

It is always a proper exercise of the discretion of a presiding Judge to decide how far a witness shall go into the minute details of the evidence. Such exercise of the discretion of a court at the trial is not a matter to be revised upon error to the Superior court.

The fact that Mr. Weeks, the administrator of the Thompson estate, allowed Mr. Cummings the one per cent. commission was competent upon the question of damages; this evidence in connection with that of S. H. Cummings upon the same subject shows that the commission was paid in good faith. It is one element to show that the second sale was in good faith.

If this court adjudge that the evidence of Mr. Weeks should have been stricken out, the verdict should not be set aside but the defendant in error should be allowed to remit the amount of the commissions, six hundred and ten dollars. [See page 47 as to the amount, and also the Judge's charge p. 73.]

The plaintiff in error contends that the real estate in question did not belong to the co-partnership of J. M. Thompson & Co.

We contend that the record directly shows that this real estate was partnership property. One-third of it was

conveyed to Mr. Cummings for the purpose of forming the partnership, and carrying on the partnership business, the same as one-third of the furniture was sold to him with other personal property. One-third interest in this property was Mr. Cummings's capital in the concern.

It was upon this property that the partnership made their profits, and out of it the losses are to be met and the partnership debts paid, if they are ever paid.

Story on Partnership, Sec's 91–93, 6th Ed.
Jarvis vs. Brooks, 27 N. H., [7th Foster,] 37.
See opinion, p. 66–7.

And if the administrator, Mr. Weeks, and the heirs see fit to recognize this right of the partnership creditors to be paid from the sale of this real estate it is all legal and right; they are the only persons concerned in that question. Capt. Grafton does not stand in a position to make any objection on the ground that this is not partnership property. As a purchaser of that real estate he has no interest in that question; standing in that position it is no concern of his whether the purchase money for the real estate was to go into the hands of the surviving partner to pay partnership debts or into the hands of the administrator to pay the private debts of J. M. Thompson.

HENRY HEYWOOD,
Counsel for Defendant in Error.

IN THE

Supreme Court of the United States

JOSEPH GRAFTON,
Plaintiff in Error,

vs.

STEPHEN H. CUMMINGS,
Defendant in Error.

Brief for Defendant in Error.

BUTLER, STILLMAN & HUBBARD,
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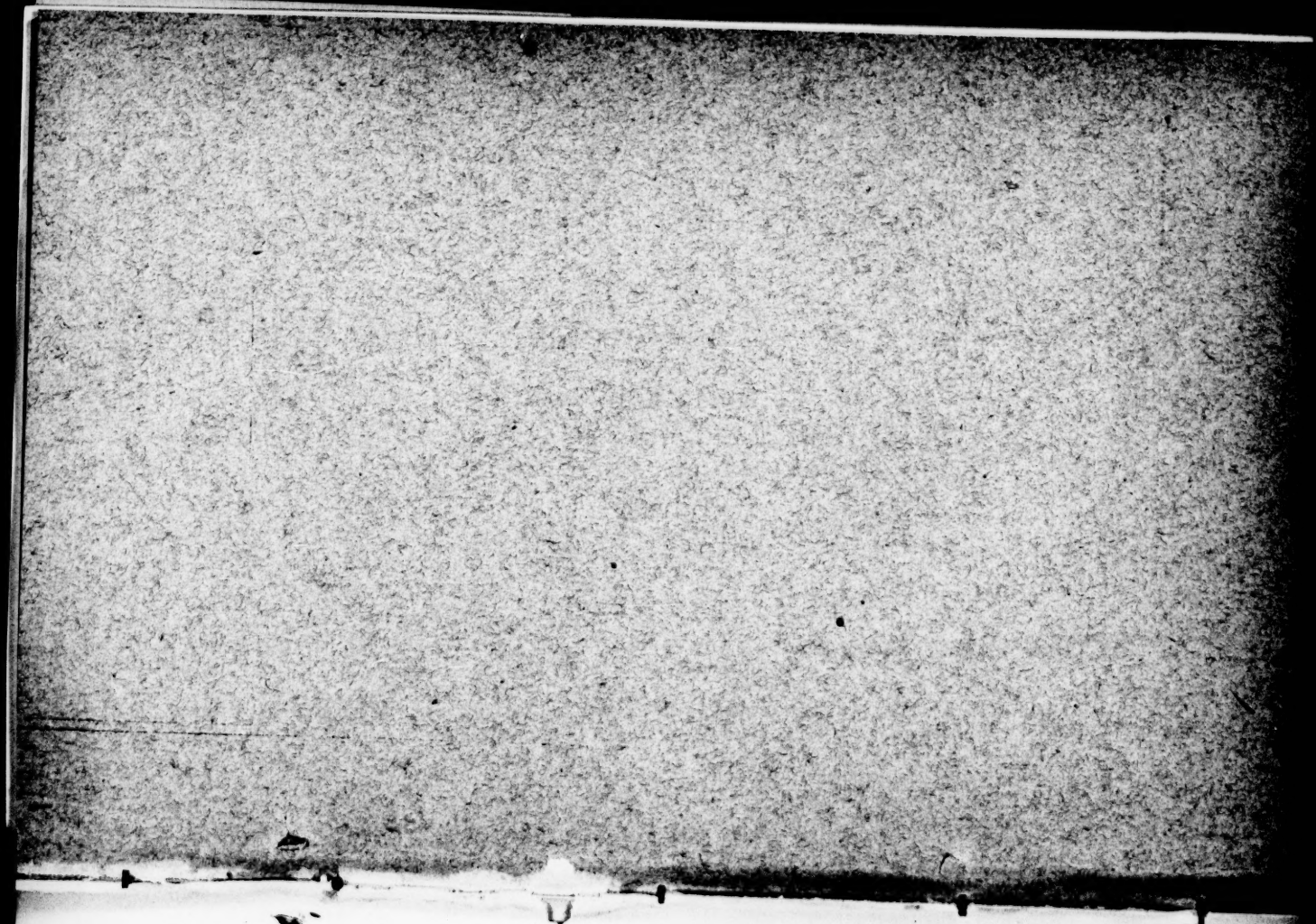
THOMAS H. HUBBARD,
Of Counsel.

New York:
Evening Post Steam Presses, 208 Broadway, corner Fulton Street.

1879.



IN THE

Supreme Court of the United States.

JOSEPH GRAFTON,
Plaintiff in Error,

vs.

STEPHEN H. CUMMINGS,
Defendant in Error.

No. 179.

Brief and Points for Defendant in Error.

Abstract of the Case.

The defendant in error was plaintiff in the court below, and obtained a verdict for $18,659.43 in an action for damages resulting from Grafton's breach of a contract to purchase real estate. Cummings is a citizen of Maine, and Grafton is a citizen of New York. The real estate is the Glen House, situated in Coos County, New Hampshire, and well known to tourists in the White Mountain region.

It had been owned and managed as a summer resort by one Joseph M. Thompson and Cummings as partners, under the firm name of J. M. Thompson & Co. After Mr. Thompson's death, Cummings had it sold at auction. Grafton was the highest bidder, and it was knocked down to him at ninety thousand dollars.

He refused to take the title after the deeds had been prepared and the time for their tender had come. The property was then put up again for sale at auction, upon notice to Grafton, and brought sixty-one thousand dollars.

Cummings then sued Grafton, with the result stated above, and Grafton now seeks, by this writ of error, to reverse the judgment entered against him on the verdict.

On the trial various questions relating to the title of the property were raised, but none that affected it before its acquisition by Thompson. It was conceded that he got a good title by purchase from one John Bellows in 1852 (*p.* 61 *print*, 235 *original*, *of record*).

Thompson had sold one-third of the property to Cummings, the defendant in error, who bought it with his own funds under an agreement that he and Thompson should form a partnership, in which Thompson should have two-thirds and Cummings one-third interest. The partnership was formed, the property was used and treated as partnership property, and was conducted by the partners as a large summer hotel during the lifetime of Mr. Thompson (*p.* 21 *of record*).

Upon his death, Cummings, as surviving partner, undertook to liquidate the business of the copartnership, and continued in possession of the partnership property (*p.* 21 *print*, 75-76, *original*, *of record*). The statute of New Hampshire provides that in such cases the surviving partner must, within a month after his copartner's death, return to the proper probate office an inventory of the estate of the partnership, and given to the Judge of Probate a sufficient bond conditioned to account for the decedent's share thereof to his executor or administrator, who, if such bond be not given, may, on giving a like bond, have entire control of the partnership property.

J. M. Thompson was at the time of his death insolvent. One James W. Weeks was appointed administrator of his estate. He required, and the surviving partner, Cummings, gave the bond prescribed by the statute. This was in January, 1870 (*pp.* 26–27 *print*, 93–98 *original*, *of record*).

About the same time the surviving partner and the administrator agreed that the hotel should be run through the next following season, and should be sold in the spring of 1871 (*p.* 36 *print*, 134 *original*, *of record*). A sale in the spring of the

year was thought most advantageous, because the purchaser would want time to advertise the house, and make it ready for the business of the summer season. The establishment was large, was valuable chiefly for its summer business, and it required over a hundred persons to do the business of the house (*pp.* 34, 46, 47, 61 *print*, 123, 171, 174, 234 *original, of record*). In March, 1871, Weeks, the administrator, in order to join with Cummings in the sale, applied to the Judge of Probate, of Coos County, for leave to sell Thompson's real estate, and stated in his application that a part thereof was an undivided two-thirds interest in the Glen House property, and that said property was in the occupancy of S. H. Cummings, the surviving partner. Under the laws of New Hampshire such a sale may be made where the personal estate is insufficient to pay the debts of the decedent (*p.* 36 *print*, 134 *original, of record*).

Upon the administrator's application, the Probate Court decreed that license be granted him to sell the right, title, and interest of Thompson in the real estate (*p.* 38 *print*, 137–138 *original, of record*), and thereupon the license was issued April 4, 1871, to sell one undivided two-thirds interest in the Glen House property. The license also recited, that this property was in the occupancy of S. H. Cummings, surviving partner of the deceased (*p.* 38, *print* 139, 140 *original, of record*).

Under this license the administrator gave notice, as required by the statute, that he would sell on the 16th of May, 1871, all the right, title, and interest of the estate of J. M. Thompson in the Glen House (*p.* 39 *print*, 143 *original, of record*).

May 16, 1871, had been agreed upon between the administrator and the surviving partner, as the best time to sell, and the property had been advertised through a season before that time (*pp.* 22 *and* 42 *print*, 80 *and* 153 *original, of record*).

Before the license to sell was granted to the administrator, Cummings, the surviving partner, had published extensively in the prominent newspapers a notice of sale, and posted another notice in conspicuous places. His published notice described the premises at some length, and stated that persons desirous of seeing the property or wishing to make inquiries might apply to J. W. Weeks, admin-

istrator, at Lancaster, N. H., or to S. H. Cummings, Falmouth Hotel, Portland, Maine (*pp.* 30, 40 *print*, 107, 144–146 *original, of record*).

One A. R. Walker, of Boston, an auctioneer, was employed by Cummings to make the sale (*p.* 40 *print*, 146, 147 *original, of record*), and on the 16th of May, 1871, proceeded to sell the property. There were present at the sale the proprietors of othor mountain hotels, who went there intending to buy the Glen House property, and one of whom testified that he was prepared to pay as much as $75,000 for it (*pp.* 28 *and* 46 *print*, 101, 168–167, *original, of record*). Grafton, the plaintiff in error, was also present, accompanied by his legal adviser, Mr. Woodbury Davis (*p.* 49 *print*, 182 *original, of record*). Grafton was a creditor of J. M. Thompson for some $10,000 (*p.* 48 *print*, 177–178 *original, of record*). On his way to attend the sale he had met Cummings, and then, and on the day of the sale, and before the the bidding, had been informed about the condition of Thompson's estate, and the estimated value of, and incumbrances on, the Glen House property (*pp.* 28, 42, 45, 50, *print*, 100, 154, 164, 188 *original of record*).

Prior to the sale there was a good deal of talk with Grafton and in his presence about the amount of the incumbrances, and their amount was determined to be about fifty-one thousand dollars. There was some talk whether the property should be sold subject to the mortgages, and finally it was decided that it should be put up and the bidder might have the option either to take it subject to the mortgages or to pay the full amount of his bid and have the surviving partner pay off the mortgages (*p.* 45 *print*, 164, 165, *original of record*). This option was expressed on a separate slip of paper, on which the auctioneer wrote: "There are mortgages on the property amounting to about $51,000. Any amount not already secured by mortgage after the payment of the twenty thousand dollars must be made secure to the satisfaction of the seller. The house to be kept open as heretofore" (*p.* 29 *of record*). The terms of sale which had previously been partly printed and filled out with writing, required that $5,000 should be paid on the spot, $15,000 on delivery of the deed, one-half the purchase money on Sept. 1st, 1871, and the balance Sept. 1st. 1872 (*p.* 21 *print*, 76, 77 *original, of record*).

The separate slip of paper is the one called on the trial Exhibit "F." The other paper, part in print, was called Exhibit "E."

The auctioneer read the terms of sale from both papers, made some verbal explanations of those portions that related to incumbrances, to the agreement about the stage and mountain routes, and to keeping the house open. He then offered the property for sale, and Grafton, the plaintiff in error, bid it in for $90,000 (*pp.* 21, 28, 29, 43, 46, 47 *print*, 76, 101, 103–107, 156, 170, 173 *original, of record*).

Grafton then signed the printed memorandum of sale. To the memorandum were pasted the notices of sale which had been published and put up by Cummings. The notice published by the administrator was not attached (*p.* 39 *print*, 143 *original, of record*). Thus the paper signed by Grafton with the papers then attached to it was, taken all together, as follows:

"I, the subscriber, do hereby acknowledge myself to be the purchaser of the estate known as the Glen House, with the furniture belonging to it, in Green's grant, New Hampshire, and sold at auction Tuesday, May 16, 1871, at 11 o'clock A. M., and for the sum of ninety thousand dollars; the said property being more particularly described in the advertisement hereunto affixed, and I hereby bind myself, my heirs and assigns, to comply with the terms and conditions of the sale as declared by the auctioneer, at the time and place of the sale.

JOSEPH GRAFTON.

TERMS OF SALE.

Ten days will be allowed to examine the title, within which time the property must be settled for; $5,000 will be required of the purchaser on the spot, which will be forfeited to the seller if the terms and conditions are not complied with; but the forfeiture of said money does not release the purchaser from his obligation to take the property. Fifteen thousand dollars to be paid on the delivery of the deed, and one-half of the purchase money to be paid Sept. 1, 1871, the remaining balance to be paid Sep. 1, 1872. The property is sold subject to the conditions of the sale of the stage route, stages, &c., which are that the proprietors of the route shall have the exclusive business of the house.

GLEN HOUSE AT AUCTION.

The famous summer resort, at the foot of Mount Washington, known as the Glen House, together with the land, furniture, mill and out buildings, will be sold at public auction at Gorham, N. H., Tuesday, May 16, 1871, at 11 o'clock A. M.

May 2d, 1871.

VALUABLE HOTEL PROPERTY FOR SALE.

The favorite summer resort known as the Glen House, situated at the foot of Mount Washington and at the commencement of the carriage road to the summit, will be offered for sale, together with the land, containing about one thousand acres (well timbered), all the outbuildings, stables and mill on the same, also the furniture, staging, mountain carriages, horses, &c. The house contains some two hundred and twenty-five rooms, capable of accommodating between four and five hundred guests. The whole property, if not disposed of at private sale previous to the first of May, will be sold at public auction to close the estate of the late J. M. Thompson. Notice of the time and place of sale will be given hereafter. Any person desirous of seeing the property, which is in thorough repair, or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Maine" (*pp.* 21–22, 28, 53–54 *print*, 76, 79, 101, 202–205 *original, o' record*).

The paper signed by Grafton was endorsed "A. R. Walker, auctioneer and agent for both parties," but when this indorsement was written was a disputed question of fact.

When the memorandum was signed Grafton was allowed, instead of paying in cash the $5,000 required by the terms of sale, to give his due bill in the following terms, to apply upon the amount for which he was a creditor of Mr. Thompson's estate.

MAY 16, 1871.

There is due James W. Weeks, administrator of the estate of Joseph M. Thompson, five thousand dollars, as

the advanced payment upon the Glen House property, this day purchased by me.

JOSEPH GRAFTON.

(*p.* 43 *print*, 157–158 *original, of record.*)

At the same time Grafton was asked whether he would have the deeds made subject to the mortgages, or whether the surviving partner should pay off the mortgages ; and Judge Davis, who was advising Grafton, and was to examine the title (*p.* 49 *print*, 182 *original, of record*), said that he could control all the mortgages upon the property, and it would give Grafton more time to make his payments to take the property subject to the mortgages, and that a deed from Mr. Weeks and a quit claim deed from the widow of J. M. Thompson and a deed from Cummings and his wife would be satisfactory, and requested that those deeds should be made and executed.

It appeared, however, from Grafton's conduct after the sale, that he did not intend to take the property himself, but made his bid with the view to make good his claim as a creditor of J. M. Thompson, or to have other parties take the purchase off his hands.

The day after the sale Cummings sent a message to Grafton inquiring his wishes in respect to the employment of men then at work about the Glen House (*p.* 30 *print*, 108–109 *original, of record*). Grafton referred the inquiry to Judge Davis, who, thereupon, went to the Glen House and, failing to see Cummings, addressed and left a letter for him, stating that he called to see him about the purchase and suggesting that Cummings, with the widow of J. M. Thompson and others, should assume the purchase, and stating that, if this were done, the debt due from the estate to Grafton might stand until Mrs. Thompson could pay it from her share of the profits of the house. The letter further stated " Grafton really don't want anything to do with the property, though he thinks Stevens or some one of their leading hotel men may have some young man that they would like to put into the house. He will try to dispose of it in that way, but hopes that before doing it I shall be able to write to him that it will be taken up here " (*p.* 62–63 *print*, 236–240 *original, of record*).

By the terms of sale the deeds were to be delivered May 26th, and the parties had agreed that they should be

delivered in Boston. Two days before the time for their delivery Grafton stated to Walker, the auctioneer, that he had bid off the property at the suggestion of Judge Davis, who told him that certain parties, creditors in Portland, whom Judge Davis represented, would join him in the purchase, for the mutual protection of Mr. Grafton and themselves, and that he, Grafton, was much surprised, on receiving a letter from Judge Davis, after his return to New York, stating that the parties referred to declined to have anything to do with the property. He further stated that he, Grafton, would rather lose the amount of his claim than to have ninety thousand dollars' worth of property on his hands (*p.* 36 *print*, 132 *original, of record*).

On the 25th of May Cummings met Grafton at the office of Mr. Minot, Grafton's brother-in-law, in Boston (*p.* 49 *print*, 184 *original, of record*). Cummings presented to Grafton three deeds, to wit.: a deed from Weeks, the administrator, a quit-claim deed from the widow of J. M. Thompson, and a deed from Cummings and his wife, and also a bill of sale of the furniture belonging to the Glen House (*pp.* 22–25, 30, 31 *print*, 81, 92, 109–112 *original, of record*). Mr. Minot took partial copies of the documents, and returned them to Cummings in Grafton's presence. Cummings then asked Grafton when they would be ready to settle for the property, and Grafton answered, the next forenoon. They met the next day, and Grafton—who says that he was not very well that day (*p.* 51 *print*, 191–192, *original, of record*)—stated to Cummings that Mr. Minot had offered to act for him. Mr. Minot then took Cummings and the auctioneer into his back office, and read from a slip of paper that he had in his hands, what follows:

"Mr. Grafton declines to accept the paper tendered, because of the conditions inserted in the paper now tendered, which are not in accordance with the terms stated at the sale, because of the mortgages on the estate outstanding, and because the title is not otherwise satisfactory."

This had been dictated by counsel whom Grafton had consulted in Boston after meeting Cummings on the day before (*p.* 50 *print*, 186 *original, of record*). After Minot had read this paper, Cummings offered to make any alterations in the deeds, if they were not satisfactory—if there was anything in the drawing of the deeds that was not satisfac-

tory, he said he would alter them. Mr. Minot then said he did not want any alterations, and asked him if he had any other papers to offer. Cummings replied that he had nothing except a bill of sale of the furniture in his hands at the time. Mr. Minot said he did not want it (*pp.* 30–31 *print*, 110–111 *original, of record*).

This ended the interview. Thereupon Cummings and the administrator advertised that the same property would be sold by the same auctioneer, at the same place where the first sale was held, "on account of Joseph Grafton," on the 9th of June, 1871, and handbills of the same purport as the advertisement were circulated throughout the country, and notice of the sale was mailed to Grafton (*pp.* 31, 41–42 *print*, 113, 148–152 *original of record*).

Mr. Minot also gave Grafton notice of the second sale. Grafton then wrote to a Mr. Jackson, who had been a clerk in the office of Mr. Minot's company, and had been in the habit of doing business for Grafton, to the effect that he had better go up and see what they were doing with the property, and instructing him to bid upon the sale in a certain event, to the amount of $60,000 (*p.* 51 *print*, 192–194 *original of record*).

Jackson and Minot both attended the sale of June 9th.

Minot talked with the auctioneer, and asked him to make the terms of sale precisely the same as they were at the first sale (*p.* 44 *print*, 159 *to* 160 *original, of record*), and stated that if the property brought more than at the first sale the difference would belong to Mr. Grafton (*p.* 33 *print*, 119 *original, of record*), and objected to the sale and forbade its taking place on account of Mr. Grafton (*pp.* 31, 33, 34, *print*, 114, 119, 159, 160, 162 *original, of record*), and stated Grafton's, alleged objections to the title.

When the property was put up, Minot started the bidding, and his companion Jackson made the next bid, and the two alternated in their bidding up to $60,000. At that point they stopped, and one C. P. Milliken bidding $61,000, the property was knocked down to him (*p.* 33 *print*, 120–121 *original, of record*).

The terms of sale were the same as upon the first sale, but were all entered upon one piece of paper instead of being on separate pieces, and there were some few changes in the phraseology which Grafton afterwards tried to construe as substantial differences.

The variations between the two and between the agreements signed by the purchasers, which call for any examination, are as follows:

The memorandum signed by Grafton at the first sale binds him "to comply with the terms and conditions of the sale *as declared by the auctioneer at the time and place of sale.*"

The memorandum signed at the second sale binds the purchasers "to comoly with the *following* terms and conditions of the sale as declared by the auctioneer at the time and place of sale, *and at the sale May* 16, 1871."

At the first sale the following part of the terms and conditions was written upon and read and announced from a separate slip of paper, to wit: "There are mortgages on the property amounting to about $51,000. Any amount not already secured by mortgage after the payment of the twenty thousand dollars must be made secure to the satisfaction of the seller. The house to be kept open as heretofore"

At the second sale these terms were embodied in one paper with the others.

At the first sale one of the terms was expressed in the following words:

"The property is sold subject to the conditions of the sale of the stage route, stages, &c., which are that the proprietors of the route shall have the exclusive business of the house."

At the second sale the language employed was as follows:

"The property is sold subject to the conditions of the sale of the stage and *mountain* route, &c., which are that the proprietor of the routes shall have the exclusive *stage and mountain* business of the house" (*pp.* 21–22, 29, 32, *print*, 76–78, 103–104, 116, 117 *original*, *of record*).

The stage routes were from the Glen House; one to Gorham, another to Conway, and another to the top of Mount Washington (*p.* 29, *print*, 105 *original*, *of record*).

Milliken, who bid in the property at the second sale, was a wholesale grocer in Portland, and knew nothing about the hotel business. Before the sale he talked with Cummings, and it was understood that if he bought the property Cummings should stay and help him run the house, and should have a half interest in it provided he paid one-half the purchase price.

Cummings did not offer to help, and did not in fact help Milliken to get the property at a low price (*pp.* 34–35 *print*, 125-130 *original, of record*). When the sale was made Cummings signed the memorandum with Milliken, and they afterwards made a written agreement specifying that Cummings was to have half the property on paying for half of it (*p.* 59 *print*, 226 *original, of record*).

He continued in the business and made part of his payments to Milliken, but about February, 1874, having failed to carry out the agreement, it was canceled and he left the business (*p.* 35 *print*, 129 *original, of record*).

His suit against Grafton was commenced nearly two years before that (*see pleadings*).

Grafton's failure to take title, made it very difficult to sell the property, more especially as it deferred the sale to so late a period that a purchaser could not make proper arrangements for the business of the summer (*pp.* 34, 46, 47, 61 *print*, 123, 171, 174, 234 *original, of record*).

Cummings demanded from Grafton, payment of what was lost by the failure of the first sale, and then brought his suit (*p.* 34 *print*, 123 *original, of record*).

On the trial all the evidence offered by Grafton was admitted, and he therefore had no exceptions founded on the exclusion of evidence.

But he took a great number of exceptions to the admission of evidence, to the refusal of the court to charge the jury as he requested, and to various parts of the charge as given. Upon each one of the exceptions he has assigned error.

Positions urged most persistently by his counsel, are that the memorandum of the sale was not sufficient to satisfy the Statute of Frauds as it existed in New Hampshire; that the separate paper Exhibit "F" was not a part of the terms of sale; that the title tendered by Cummings was defective, because the deeds were drawn subject to mortgages; that Cummings was not the seller, or, at all events, Weeks should have joined with him as a plaintiff; that the difference between the amounts bid at the two sales was no measure of damages, and that there was no proof of damage.

The various assignments of error group themselves about these positions. It should be observed that a special issue

was made by the pleadings upon the question whether the paper Exhibit "F" was read and announced as one of the terms of sale by the auctioneer at the time of the sale.

The declaration did not set out the terms of sale *in extenso* (*p.* 2 *print*, 7 *original, of record*), but it averred the tender of deeds in pursuance of the terms of sale (*p.* 3 *print*, 10 *original, of record*).

The plea averred an agreement to convey free of mortgages (*pp.* 10–11, *of record*).

The replication averred that at and prior to the sale, and as part of the terms and conditions thereof, it was announced that there were mortgages on the property which the purchaser might assume and pay as part of the price, and that after the sale Grafton requested and was allowed to assume them according to the terms of sale (*p.* 13 *print*, 47–49 *original, of record*).

The rejoinder set out the printed terms of sale and averred that there were no others (*pp.* 15–17 *print*, 55–59 *original, of record*), and the surrejoinder put this averment in issue (*p.* 18 *of record*).

The plaintiff below had a general verdict.

POINTS.

First.—There was a sufficient memorandum of the contract in writing to satisfy the requirements of the Statute of Frauds, as it existed in the State of New Hampshire.

The statute is as follows: "No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereto authorized in writing."

General Statutes of New Hampshire, Edition 1867, p. 407, sec. 12.

The New Hampshire courts had construed a previously existing statute of similar purport, to require that the memorandum must indicate both the parties to the contract.

Sherburne *v.* Shaw, 1 N. H., 157.

And, indeed, the rule of construction generally prevails that the memorandum must contain the names of both the contracting parties.

Browne on the Statute of Frauds, § 372.

The plaintiff in error insists that the memorandum signed by Grafton as purchaser did not show who was the seller.

It might, perhaps, be urged with some effect on behalf of the defendant in error, that the statute of New Hampshire cannot control the proofs of an action tried outside the limits of that State; that the statute, in prescribing that "no action shall be maintained" intends that "no action shall be maintained in the State of New Hampshire," and not that "no action shall be maintained in the Southern District of New York"; that the statute limits the remedy only, and, like statutes of limitation as to time, is local in its application; that the Statute of 29 Car., II., is not a part of the common law adopted throughout the United States without re-enactment, and that, therefore, the contract in suit does not fall within any Statute of Frauds.

But such an argument is not necessary for the defendant in error, and he may safely assume that under the rule stated in Walker *v.* Whitehead, 16 Wall., 314, the New Hampshire statute is controlling. For the objection of the plaintiff in error is fully answered by the evidence.

1st. The letter written by Judge Davis to Cummings answers it.

It is said that "a letter addressed by the defendant to, or received by him from the plaintiff, and sufficiently connected in meaning with the other writings relied upon, as constituting the memorandum, may be evidence to show the plaintiff to be a party to the contract."

Browne on the Statute of Frauds, § 373.

Allen *v.* Bennett, 3 Taunt., 169.

In the case of Beckwith *v.* Talbot, 5 Otto, 289, the principal memorandum was not signed by the defendant, as required by the statute, but it was held that letters written by the defendant to the plaintiff long afterwards, and plainly referring to the subject matter of the

memorandum, could be connected with it by parol proof, and, taken in connection with it, satisfied the requirements of the statute.

The court there said: "It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the Statute of Frauds, should, on their face, sufficiently demonstrate their reference to such agreement, without the aid of parol proof. But the rule is not absolute" (*p.* 292).

In the case at bar, Davis, the attorney and agent of Grafton, on the day after the purchase, was specially deputed by Grafton to communicate with Cummings, and did communicate with him by addressing to him a letter which, in substance, says: "Grafton is sick of his purchase and wants you to let him off. He is going to New York and will try there to get rid of the property he has bought, but if he fails he hopes you will relieve him by accepting a plan for that purpose which he now proposes" (*pp.* 62–63 *of record*).

2d. The printed advertisement pasted to the memorandum, signed by Grafton, and thus forming a part of the memorandum when he signed it, answers the objection of his counsel. That advertisement states that "any person desirous of seeing the property * * * or wishing to make any inquiries, can do so by applying to J. W. Weeks, administrator, Lancaster, N. H., or S. H. Cummings, Falmouth Hotel, Portland, Maine" (*p.* 22 *of record*).

This was in substance a statement in the memorandum, that Cummings was prepared to treat with purchasers, to show them the property, and to give them all the information about it that they might wish to have. It thus designated Cummings either as the seller, or the agent for the seller. Either designation complies with the statute. The rule is that no formality is requisite in this respect, and it is sufficient if, upon the memorandum, in addition to its having the signature of the party to be charged, it appear with reasonable certainty who the other party is, and parol evidence is

admissible to show that the person whose name appears on the memorandum acted as agent for one of the parties to the contract.

Gowen *v.* Klous, 101 Mass., 449, p. 454.
Browne on the Statute of Frauds, § 373.
Dykers *v.* Townsend, 24 N. Y., 57.
Salmon Falls Manufacturing Company *v.* Goddard, 14 Howard, 446, *pp.* 454–5.

In the case last cited, this court stated the rule to be that "extraneous evidence is also admissible to show that a person whose name is affixed to the contract, acted only as an agent, thereby enabling the principal either to sue or to be sued in his own name; and this, though it purported on its face to have been made by the agent himself, and the principal not named."

It follows that the memorandum showed with reasonable certainty that Cummings and Weeks, both or one, were the sellers or agents for the sellers of the property, and that it was competent to prove in what capacity they acted; and to prove that Cummings was the principal, and that Weeks joined merely to aid him in giving title to the property.

3d. The auctioneer's indorsement, written upon the memorandum, sufficiently indicated who was the seller, and answers the objection of the plaintiff in error.

The auctioneer was the agent for both parties at the time of the sale, and for the seller afterwards, until the duties of his agency were accomplished.

Mews *v.* Carr, 1 Hurlstone & Norman, 484.

In that case the court said: "No doubt, an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature; but the moment the sale is over, the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only."

Kenworthy *v.* Schofield, 2 Barn. & Cress., 945.

It was the duty of the auctioneer, like that of any agent, to perform the service for which he was employed. That service was to sell the property, and for

that purpose to make a sufficient memorandum of the bargain effected between the purchaser and his employer. His duty as agent was not accomplished until this was done, and it could be done at any time before the action was brought.

Browne on the Statute of Frauds, §§ 352a, 353, 353a.

When the action was brought, the cause of action should be complete.

It follows that the court ruled correctly in allowing proof of the indorsement, "A. R Walker, Auctioneer, and agent for both parties," to be given (*p.* 28 *print*, 102 *original, of record*); and, because the time when the indorsement was written was in dispute, in submitting it to the jury to determine when it was written (*p.* 53 *print*, 202 *original, of record*). Indeed, the only evidence as to the time when the indorsement was written, was that it was not written on the 26th of May, 1871 (the day Grafton broke his contract), when the auctioneer handed Minot a copy of the terms of sale, and Minot compared them with the original.

The foregoing considerations dispose of the assignments of error for the admission of the auctioneer's indorsement (*p.* 74), and for the admission of evidence about Cummings' message to Grafton, and Grafton's reply to it through Davis on the next day after the sale (*pp.* 75 *and* 80 *of record*); and for the refusal of the court to instruct the jury that no contract was made for the sale and purchase of real estate between the plaintiff and the defendant (*p.* 81); and for the instruction given by the court to the jury in reference to the auctioneer's agency, and his indorsement of the memorandum (*p.* 83).

Second.—The memorandum consisted of all writings connected, physically, or by distinct reference made in one to the other.

Browne on the Statute of Frauds, §§ 346–349.
Salmon Falls Mfg. Co. *v.* Goddard, 14 How'd, 446, *p.* 456.

Inasmuch as it was *a memorandum of the contract* and *not the contract itself*, parol evidence was admissible to show that the memorandum as put in evidence conformed to the contract and expressed its essential terms.

Sievewright *v.* Archibald, 17 Queen's Bench R. 103.

Parton *v.* Crofts, 33 Law Journal Rep., C. P. 189.

McLean *v.* Nicoll, 7 Jurist, N. S., 999.

Lerned *v.* Wannemacher, 9 Allen, 412.

Langdell's Select Cases on Sales, Vol. 1., *p.* 1032, *et seq.*, and cases there cited.

Parol evidence was also admissible, to the same extent that it would have been admissible had the contract been in writing, to explain ambiguities, to identify the subject matter to which the writing referred; to show the situation of the parties at the time the writing was made, and the circumstances under which the parties executed it.

Benjamin on Sales *p.* 156-7.

Browne on the Statute of Frauds, §§ 409, 409 a.

Blossom *v.* Griffin, 13 N. Y., 569 *p.* 573.

Springsteen *v.* Samson, 32 N. Y., 703, *p.* 706.

Somewhat greater latitude than is allowed in the case of written contracts should be granted in proving by parol the details of the contract, since the memorandum is required to contain only the essential elements, and not every individual incident in the contract.

McLean *v.* Nicoll, 7 Jurist, N. S., 999.

Salmon Falls Mfg. Co. *v.* Goddard, 14 How'd, 446, *p.* 454.

Linsley *v.* Tibbals, 40 Conn., 522.

These propositions, which are so well settled as scarcely to require the citation of authorities in their support, dispose of many of the assignments by the plaintiff in error.

1st.—They dispose of the various objections and assignments taken in respect to the separate paper called Exhibit "F."

The Court allowed proof that this paper was made by the auctioneer at the time of the sale as one of the terms of sale, (*pp.* 29, 43, 44, *of record*), and left it to the jury to say whether in fact it was read, and instructed them that if it was read, then deeds of conveyance subject to the mortgages might be tendered. This was correct, because the memorandum signed by Grafton bound him "to comply with the terms and conditions of the sale *as declared by the auctioneer at the time and place of the sale*," (*p.* 21, *of record*), and thus, by distinct reference, made Exhibit "F" a part of the memorandum.

It was correct also because Exhibit "F" was not an essential element of the contract of sale, but was only a condition as to the manner in which the purchase price should be paid. The case is the same as though the memorandum had stated "The price of the property is ninety thousand dollars, which may be paid in cash, or according to the option announced by the auctioneer;" and is similar to the case of Atwood *v.* Cobb. 16 Pick, 227, where it was held sufficient for the memorandum to state that the price was the same as paid on a former occasion. See also Browne on the Statute of Frauds, § 378.

Moody v. Smith, 70 N. Y., 598.

2d. The foregoing propositions also dispose of the various objections and assignments taken in respect to the admission of evidence as to what the auctioneer said at the time of the sale. The court instructed the jury that *only the written terms of sale declared by the auctioneer* were referred to in the memorandum. Evidence of other terms, therefore, had it been improperly admitted, and had it been given, could not have prejudiced the plaintiff in error. But, in fact, all the evidence that was given of oral declarations by the auctioneer was consistent with the terms of the written declarations, and did not even extend them (*pp.* 29, 30, 43, 45, 46, 47 *of record*), and evidence of the auctioneer's parol statements was properly admitted to show that the contract, as made, at the auction sale, was the same as expressed by the memorandum, and to show the incidents and details of the contract which were not ex-

pressed, but only referred to in the memorandum, and to show the circumstances under which the parties contracted.

3d. The propositions at the head of this point also dispose of the objections and assignments taken in respect to evidence of conversations at and before, and immediately after, the time of the sale, and in respect to evidence of the plaintiff's relation to the property, and of the statute under which he held exclusive control of it (*Rev. Stats. of N. H., Ch.* 106, *Secs.* 3, 4, 5, 6).

To show the situation of the parties and the circumstances under which they contracted; to show that Cummings was the real party represented by the names of Weeks and Cummings in the advertisement annexed to the memorandum; to show that Grafton knew the condition of the parties and of the property, and entered into the contract with his eyes open, and, after the sale, availed himself of the option in the terms of sale that allowed him to take title subject to the mortgages, it was proper to show that Cummings had, under the New Hampshire statute, taken exclusive control of the property, and bound himself to account to the representatives of his deceased partner for its value (*pp.* 26, 27 *and* 70 *of record*), and that he had talked with Grafton before the sale, and informed him about the condition of Mr. Thompson's estate and the mortgages on the property (*p.* 70 *of record*), and that Grafton had been informed about the mortgages from other sources (*pp.* 78, 79 *of record*); and that it was in consequence of a conversation between him and others that the option to assume payment of the mortgages, as part of the purchase price, was written as one of the terms of sale (*p.* 78 *of record*); and that after the sale he availed himself of that option, and expressly requested that the deeds should be made subject to the mortgages, and specified what deeds and whose he wished to have (*pp.* 45 *and* 78 *of Record*).

Third.—The rulings of the court to the effect that Cummings might maintain the action, and that the non-joinder of Weeks as a plaintiff would not prevent Cummings from having a verdict, were correct, and the assignments of error in respect to these rulings are not good (*p.* 81 *of record*, 3*d and* 4*th*, *and p.* 83, *print.* 316 *original, of record*).

1st. The evidence shows that Cummings was in exclusive possession of the property, and had given bonds to account for his deceased partner's share in it, and employed the auctioneer to sell it, and that Weeks joined in the sale only to enable Cummings to sell at better advantage, and to give a more satisfactory title, and that the license granted by the Probate Court to Weeks recognized and recited the possession of Cummings.

It has been shown above that this evidence was properly admitted. It follows that Cummings was the seller; that the contract was made between him and Grafton, and that he was properly the sole plaintiff in an action for its breach.

Gowen v. Klous, 101 Mars., 449 p. 454.

2d. If there had been a defect of parties plaintiff in consequense of the non-joinder of Weeks, Grafton would have waived it by omitting to plead it specially.

Grafton pleaded to the declaration (certain demurrers having been previously disposed of) in March, 1873 (*pp.* 9–12, *print*, 40–41, *original, of record*).

His pleas were the general issue, and certain special pleas averring that *the plaintiff* made such contract with himself as was made, and had broken it.

If it be conceded that, by the rules of the common law, Grafton might, notwithstanding his special pleas, have taken advantage of the non-joinder of Weeks under his plea of the general issue, yet he could not do so under the law in force at the time his plea was entered. The Act of June 1st, 1872, Ch. 255, § 5, 17 Stats. at L., 197, was then in force, and required the practice, pleadings and forms and modes of proceeding in common law actions in the Circuit Courts of the United States to conform as near as might be to the practice, pleadings and forms and modes of proceed-

ing existing at the time in the courts of the State where such Circuit Courts were held.

At the same time, sections 144 and 148 of the Code of Procedure were the existing law of the State of New York, and required that the objection to "a defect of parties plaintiff or defendant" should be taken either by demurrer or answer (plea), or should be deemed to be waived. And it was necessary that the objection should be *expressly* raised.

Byxbie *v.* Wood, 24 N. Y., 607, p. 609.

It could not be taken under a general denial (general issue).

Abbe *v.* Clark, 31 Barbour, 238.
Dillaye *v.* Parks, 31 Barbour, 132.

Fourth.—Cummings tendered sufficient deeds of conveyance and title under the contract, and kept the contract. The rulings of the court on this subject were correct.

1. There is no force or pertinence in the assignment of error for refusal to charge that under the evidence the real estate in question did not belong to the copartnership of J. M. Thompson & Co., and the plaintiff was not authorized to make a sale thereof and a conveyance thereof in his character as surviving partner (*p.* 81 *of record*). It is immaterial whether the real estate belonged to the copartnership or not, and, whatever the fact may have been, it was not necessary that the plaintiff should be authorized to make a sale and conveyance in the character of surviving partner. A man may agree to sell what he does not have perfect title to at the time of the agreement. It is enough if he is able and willing to convey at the time fixed by the contract, and according to its terms. At the time of the auction sale it was not necessary that Cummings should be the sole owner of the property, and it is not important to determine whether the Statute of New Hampshire, under which, as surviv-

ing partner, he held exclusive control of the real estate, gave him power to pass its title by his own deed alone.

Nor is it necessary to decide whether Cummings was "authorized to make conveyance," * of the property "in his character as surviving partner." He did not attempt to make such conveyance (*p.* 24 *of record*). Whether the real estate was copartnership property or not, it is certain that perfect title to it would pass by deeds from Cummings and wife, and Thompson and wife, or their legal representatives. These were the deeds that Cummings tendered (*pp.* 22–25 *of record*). It is quite plain that at the time of the auction Cummings was in no way disqualified from making a valid agreement to sell the property; and that at the time agreed upon for passing the title he tendered a title that was not predicated upon his absolute ownership of partnership real estate.

2. There is no force in the objection that the condition of the deed in relation to the staging was different from what the terms of sale prescribed (*p* 82 *of record, Nos.* 15 *and* 16).

The memorandum stated that the property was sold "subject to the conditions of the sale of the stage route, stages, &c." (*p.* 22 *of record*). The fact as proved was that a part of the stage route was the mountain route (*p.* 29 *of record*). The deed stated that the property was sold "subject to the conditions of the sale of the stage and mountain routes" (*p.* 25 *of record*). The memorandum stated that the proprietors of the route should "have the *exclusive business* of the house." The deed stated that the proprietors of the stage property should have "the exclusive staging, livery and stable business of the house."

It would seem hardly necessary to take time in contesting a proposition, that the terms of the deed made the condition, as to the staging, broader or more onerous than the terms of the memorandum, had not Grafton testified, and his counsel argued, with an energy almost frantic, that such was the case.

3. The assignments of error, for refusal to rule that the administrator's deed did not pass any title, and that his proceeding, in respect to the sale, was irregular, is without any good foundation (*pp.* 81-82, *of record Nos.* 9, 10, 11, 12).

The most that the administrator's deed needed to accomplish, was to transfer the interest that Thompson had in the real estate. The law of New Hampshire authorized the administrator to sell that interest for the payment of debts, in case the personal property should not be sufficient.

Laws of N. H., Ch., 182, *p.* 372 (*Ed. of* 1867).

Thompson's personal property was not sufficient to pay his debts, for his estate was insolvent (*p.* 35 *print*, 134 *original of record*).

The administrator took the prooceedings prescribed by the Statute, to obtain leave to convey the intestates' interest in the real estate. He obtained from the Probate Court a license to sell and convey, recognizing the situation of affairs, and the occupancy of the property by Cummings. He made a conveyance, under the license (*p.* 23 *of record*), and reported all his proceedings to the Probate Court, and that court approved his proceedings as sufficient (*pp.* 37-42 *print*, and 153 *original of record*).

The Judge of the same Probate Court, approving the proceedings was examined as a witness, by the defendant, and on his cross-examination testified, that Probate Courts of New Hampshire, "are made by the Statute *Courts of Record, and their judgments or decisions, upon matters within their jurisdiction, are conclusive, and can only be revised or impeached upon appeal, for which the Statute provides, and the decisions of said courts cannot be impeached collaterally,*" (*p.* 58 *of Record*).

Another expert, examined by the defendant below, to prove the law of New Hampshire, testified to the same effect (*p.* 56 *of Record*). It being thus established by the defendants own witnesses that the deed of Weeks was sufficient under the laws of New Hampshire to convey Thompson's interest in the real estate situated

there, and that the proceedings by which the conveyance was made, could not be disturbed, save by appeal from the decision of the Probate Court, it does not seem profitable to inquire further into the general rules regulating the effect of such proceedings and prescribing the method of attacking them, or to speculate whether the proceeding taken by the administrator might by any possibility or in any way have been successfully attacked. It should be added that the deed from Weeks as administrator was exactly the deed that Grafton, by his counsel, Judge Davis, had requested (*p.* 45, *print*, 166, *original of record*).

4. Cummings' deed was properly made subject to the mortgages then existing.

It has already been shown that the separate paper, marked "Exhibit F," which was read by the auctioneer at the time of the sale, and announced by him as one of the terms of sale, permitted the purchaser to make his payments to the extent of the outstanding mortgages by assuming payment of those mortgages, if he chose to do so, and that Grafton did choose to do so, because he thought he could control the mortgages and obtain more time to make his payments; and that he asked to have the deeds made subject to the mortgages (*p.* 45 *of record*). The deeds tendered were therefore in exact accordance with the agreement and contract of sale.

5. The assignment of error in respect to the supposed charge of the court that a compliance with the contract might be waived by parol after the sale, is not good (*p.* 84 *of record*).

(*a.*) The charge of the court upon this subject was only to be considered in the event the jury should fail to find that the paper "Exhibit F" was made at the time of the sale (*p.* 70 *print*, 271 *original of record*). A distinct and separate issue of fact was made by the pleadings on that point. The jury found a general verdict for the plaintiff, and thereby settled that

fact, as well as all others distinctly put in issue, in the plaintiff's favor.

Wolf *v.* Goodhue Fire Ins. Co., 43 Barbour, 400, p. 405.

It must therefore now be assumed that the jury found that the paper "Exhibit F" was read at the time of the sale, and that therefore instructions as to what they might do in case they found otherwise, could not have affected the defendant's rights.

(b.) But the particular instruction referred to was correct in substance and as applied to the facts of the case, although its phraseology, considered with reference to an abstract proposition, might be subject to criticism.

Instructions of the court must apply to the facts proved in the case. If they have no such application and could have had no influence on the verdict, they afford no ground for a reversal of the judgment, however erroneous they may be.

United States *v.* Wright, 1 McLean, 509.

"Mere verbal criticisms of the charge of the judge are not entitled to any considerable weight in a Court of Errors. Such Courts look at the substance and legal effect of the language employed, without much regard to mere inaccuracy of expression, unless the error is one which might prejudice the rights of the party seeking redress."

First Unitarian Society *v.* Faulkner, 1 Otto, 415, p. 421.

Now, the facts proved in the case to which the instruction in question applied were, that after the sale, in a conversation with Judge Davis and Grafton, they asked that the deeds be made subject to the mortgages, and that, in consequence of their request, the deeds were so made. And the substance and legal effect of the language employed by the judge in giving the instruction was the same as if he had said to the jury: "If you find that, after the sale, Grafton

asked to be allowed to make his payment by assuming the mortgages, and for that purpose to have the deeds made subject to the mortgages, and that the plaintiff acted on that request, and, in consequence of it, made his deeds in that form, then the law is that the defendant cannot object to the deeds and refuse to take the title on the ground that the deeds were made subject to the mortgages."

This was correct.

The case of Swain *v.* Seaman, 9 Wall., 254, settles and establishes the rule of law that the terms of a contract, falling within the operation of the Statute of Frauds, cannot be varied or altered by parol. But it also applies the doctrine of estoppel and states: "When a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

The language employed by the court below, taken in the abstract sense, and without reference to the facts proved, might be objectionable under the rule as to waiver by parol stated by Judge Clifford, in Swain *v.* Seaman.

But the substance and legal effect of the language, as applied to the facts proved in the case, is supported by the doctrine of estoppel, as stated in the same opinion.

It would be monstrous indeed if Grafton could repudiate his contract, because the seller had consented to accept the payment of the purchase money at the time, and in the manner he himself proposed.

The doctrine of estoppel, here relied upon, is also stated to the same effect, though in a different form, in

Browne on the Statute of Frauds, §§ 423, 424, 425.

There the distinction is stated between the *contract*, which is within the provisions of the Statute,

and the *performance*, which is not. And the rule is stated to be, that when an action is "brought upon the original contract, if the defendant set up that the plaintiff did not himself perform according to its terms, the plaintiff may reply that he was ready to do so, but that it was dispensed with by the agreement for the substituted performance; and his proof of such agreement is not considered a variance from his declaration.

See also Moody v. Smith, 70 N. Y., 599.

The rule applies exactly to the case at bar. The language of the court below was inaccurate, so far as it stated that the plaintiff replied that at the instance of the defendant certain parts of the contract had been waived.

The replication did not aver a waiver, but set up the facts as they had been before stated (*p.* 13, *fol. of Record*). It could not mislead the jury or harm the defendant that the judge used the word "waiver," so long as his instructions were correct in substance and in legal effect.

Railway Company v. Whitton, 13 Wall, 270 p. 291.

Fifth.—Grafton broke his contract purposely and deliberately, and feigned fictitious excuses to shift the consequences from himself to Cummings. His conduct was a sham from beginning to end. Evidence showing this was material and relevant and properly admitted. It showed intent, and helped determine the substantial issue, to wit: which party was at fault in the breach of contract.

1. On this ground, as well as that stated before, the testimony of his conversation with Cummings on the way to the sale, and his inquiries about the value and liabilities of Thompson's estate, and the mortgages on the real estate was properly admitted. Grafton was then reckoning how much the real estate must bring before Thompson's estate could pay his claim.

2. On the same ground evidence of what was said about the mortgages by the auctioneer at the time of the sale, and by others about the same time in Grafton's presence, and evidence of his request immediately after the sale, made through his counsel Judge Davis, that the deeds should be drawn subject to the mortgages, was properly admitted. It shows that the reason given to Cummings in Boston for refusing the deeds was an afterthought and a pretense.

3. On the same ground, as well as for the reasons shown before, evidence was properly admitted that Cummings sent by his father a message to Grafton on the day after the sale, and that Grafton deputed Judge Davis to answer it, and that the latter did answer it by stating frankly Grafton's wishes and asking Cummings to release him from the purchase. Judge Davis' letter was truthful and exhibits in very clear contrast the disingenuousness of Grafton's later conduct and of his testimony.

4. On the same ground evidence was properly admitted of Grafton's conversation with Walker the auctioneer, in Boston just before the deeds were tendered. It showed that Grafton did not intend to take the property, though he had not then determined how to avoid taking it.

It was proper to prove this conversation by Soule, who heard and took minutes of it, and to allow Soule to read his minutes, Walker having died before the trial. Soule testified (*p.* 36 *of Record*) that he made the memorandum at the time of the conversation; that independently of the memorandum he had very little recollection of what was said, and did not recollect what Mr. Walker said, but that the memorandum brought to his mind that Mr. Walker was there and had this conversation, in a general way; that at the time he made the memorandum he knew it to be a correct statement of the conversation, and that he knew the same at the time he testified, and recollected that such conversation took place (*p.* 36 *print*, 131 *and* 133 *original of record*). This

brought his testimony within the rule that a witness may assist his memory by the use of a writing, when he recollects that he saw the writing "while the facts were fresh in his memory, and that he then knew that the particulars therein mentioned were correctly stated," and when he "recollects having seen the writing before, and though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct."

Greenleaf on Evidence, Vol. 1, §§ 436, 437.

Merrill *v.* Ithaca and Oswego R. R., 16 Wend., 586, p. 595–599.

In the case last cited the Court said: "The result is that original entries, attested by the man who makes them, may be read to the jury, though he remembered nothing of the facts which they record."

Haven *v.* Wendell, 11 N. H., 112.

5. On the same ground evidence was properly admitted of conversations between Minot and Jackson and the auctioneer at the time of the second sale. Grafton testified that Jackson was acting under his direction. Minot was Grafton's brother-in-law, and acted for him in rejecting the deeds offered by Cummings, and gave him notice of the second sale, and spoke for Grafton at that sale. The conversations of both these men reflect Grafton's wishes and intent, and show that he pursued at the second sale the same disingenuous course of quibbling that he commenced immediately after the first. These conversations, like most of the others, are also parts of the *res gestæ*, and moreover they have a direct bearing on the question of damages.

Greenleaf on Ev., Vol. 1, § 108, *et seq.*

Sixth.—The rulings and instructions of the court as to the right to damages and the measure of damages are correct. The theory of the defendant's counsel was that the land and buildings were worth as much after the breach of

contract as before, and that therefore no damage ensued from the breach.

This theory ignores the character and uses of the property and would excuse any breach of contract which did not actually demolish the buildings or impoverish the land.

By this theory Grafton might, as he did, deprive the plaintiff of the benefit of selling the property at the most advantageous time, and frustrate the long preparation for the sale, yet go scot-free.

He might, by the same theory, deprive the plaintiff of the benefit, which the prospect of a full season's business for the house would give him at the sale, or subject the plaintiff to any loss he might suffer by being compelled to defer the sale to another spring, and yet be discharged from all claim for damages.

The court instructed the jury that the measure of damages was the difference between the contract price and the saleable value of the land at the time of the breach, and the expenses of the second sale (*p.* 71 *of record*).

This was far more favorable to the defendant than the strict rule that has been followed in New York, making the contract price and interest the measure.

Franchot *v.* Leach, 5 Cowen, 506.
Richards *v.* Edick, 17 Barb., 260.
And see Tripp *v.* Bishop, 56 Penn. 424.

"The general rule is that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed in near as may be, in the situation he would have occupied if the wrong had not been committed."

Wicker *v.* Hoppock, 6 Wall. 94, p. 99.

Sedgwick states that the English rule in cases like that at bar, is that the measure of damages is the difference between the price fixed in the contract, and the value at the time fixed on for the delivery of the deed.

Sedgwick on Measures of Damages, 5 Ed., p. 203, *et seq.*

The same rule has been followed in the United States.

Old Colony R. R. *v.* Evans, 6 Gray, 25.
Sawyer *v.* McIntyre, 18 Vt., 27, p. 31.

It conforms to the rule fixing damages for the breach of a contract to purchase personal property.

Sedgwick on Measure of Damages, 6th ed., § 336.
Sands *v.* Taylor, 5 Johns. R., 395,
Crooks *v.* Moore, 1 Sandf. (N. Y.), 297 p. 302.
Dustan *v.* McAndrew, 44 N. Y., 72, p. 78.

The time fixed for delivering the deed was, in the case at bar, the time of the breach, and the charge of the court, therefore, followed the English rule, which, it is submitted, if not the prevailing rule in this country is within the limits of that rule.

The jury found a verdict for $15,000, with interest from the time fixed for the delivering the deeds (*p.* 73 *of Record*). In thus applying the rule of law given them by the court, they gave to the defendant, Grafton, the benefit of the most favorable construction of the facts. They did not find a verdict for the difference between the contract price and the value of the property, as determined by the second sale. This difference was $29,000. This verdict was for the difference between the contract price and the price that *bona fide* bidders engaged in the hotel business were prepared to bid at the first sale (*page* 46 *of Record*). This, certainly, did no more than place the injured party in the situation he would have occupied if the wrong had not been committed. It did far less; for after the breach he was unable to sell his property for $75,000.

The rule stated by the court was strictly correct, but the verdict of the jury was more lenient to the defendant than was the law.

As to the objections made to the second sale, a reference to the charge of the judge is a sufficient answer to them. He instructed the jury that the price brought at the second sale was an important fact for them to consider (*p.* 72 *print*, 279 *original of Record*), but that they were also to consider the defendant's claim that the property was worth as much in June as in May, and the claim that the second sale was